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AMERICAN AND ENGLISH

RAILROAD CASES.

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND, DECIDED BY THE COURTS OF APPELLATE JURISDICTION

IN THE

UNITED STATES, ENGLAND AND CANADA.

EDITED BY

THOMAS J. MICHIE.

VOLUME XII.

NEW SERIES.

GEO. R. B. MICHIE & CO., PUBLISHERS.

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AMERICAN AND ENGLISH

CORPORATION CASES New Series

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IN THE

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EDITED BY

THOMAS J. MICHIE,

ASSISTED BY

BASIL JONES AND A. R. YELLOTT.

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THE

AMERICAN AND ENGLISH

RAILROAD CASES

NEW SERIES

VOLUME XII

HASSEN

v.

NASSAU ELECTRIC R. CO.

(*Supreme Court of New York, Nov. 1, 1898.*)

Injury to Passenger Riding on Running Board of Street Car—Contributory Negligence.*—Where it is customary for passengers to stand upon the running board of crowded street cars in motion, it is not negligence, as matter of law, to ride in such position, even when there is standing room between the seats.

Same—Negligence.—Where it appeared from the evidence that plaintiff, a passenger, was injured while so riding, through a sudden and violent jerk, occasioned by the application of excessive motive power by the motorman, defendant was properly found guilty of negligence.

APPEAL by defendant from trial term. *Affirmed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, and HATCH, JJ.

Henry Yonge (Clarence J. Shearn, on the brief,) for appellant.

James C. Cropsey, for respondent.

HATCH, J. The plaintiff boarded the defendant's car at Coney Island for the purpose of being transported to the borough of Brooklyn. The car was an open car, with seats running across and a running board upon the side. It was very much crowded, having

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*See East Omaha St. R. Co. *v.* Godola (Neb.), 7 Am. & Eng. R. Cas., N. S., 300, and exhaustive *note*, p. 305.

from 70 to 90 passengers. All of the seats were filled, and people were standing in the space between the seats, and also upon the running board. There was space between the seats, unoccupied, when plaintiff boarded, and he could have occupied such space within the car. He remained upon the running board, as did also several other passengers. His right so to remain was not questioned by the conductor of the car, nor was any request made by the conductor, or by any other person, that he occupy the space between the seats. On the contrary, the conductor demanded and received the plaintiff's fare, and made no suggestion that it was an improper or dangerous place for him to ride. It is customary for passengers upon this line, when the cars are crowded, to stand upon the running board of the car. While riding in this position, and when the car was running at about six or eight miles an hour, it gave a sudden violent jerk, which the jury were authorized to find was occasioned by the sudden application of excessive motive power by the motorman. The sudden and violent character of the jerk caused the plaintiff to break his hold with the left hand upon the stanchion of the car, swinging his body outward, in which position his head was brought in contact with a trolley pole at the side of the track, inflicting the injuries of which complaint is made.

Injury to Passenger Riding on Running Board of Street Car—Contributory Negligence.

It is contended by the defendant that the plaintiff was guilty of negligence as matter of law; that if he could, with slight inconvenience to himself, procure standing room between the seats of the car, he was bound so to do; and, as it was conceded that there was such space, the plaintiff must be deemed to have voluntarily remained in a place of danger, which defeats his right to recover. This question was raised by motion for a nonsuit and in the requests to charge. It may be conceded that a person would be chargeable with contributory negligence, in the ordinary operation of a car, if he stood upon a running board when he might obtain a safe place within the body of the car. But, under the circumstances of this case, we think that such proposition may not be affirmed as matter of law. It is well known that the space between these seats, when the latter are occupied, is quite narrow. With small people upon a seat, the space left might be occupied, with more or less inconvenience. With large people it may become a matter of extreme difficulty to stand in the space, and with some an impossibility. In all cases it is a place of discomfort, and disagreeable both

to the person standing and to those sitting. The cars running from Coney Island to Brooklyn, at most times, are crowded within and without, in all available space. The defendant expects that this will be so and, if it does not invite, it makes little effort, if any, to prevent, such condition, and collects and receives fares from those sitting and those standing, indifferent as to the place where the passenger secures his foothold. Under such circumstances we think the question becomes one of fact to be determined by the jury, having regard to particular conditions. Bruno *v.* Railroad Co., 5 Misc. Rep. 327, 25 N. Y. Supp. 511, affirmed 147 N. Y. 711, 42 N. E. 722; Wood *v.* Railroad Co., 5 App. Div. 492, 38 N. Y. Supp. 1077. The court charged the jury in accordance with this view of the law, and, upon the evidence, we think the submission was proper. The defendant was properly found guilty of negligence upon the testimony. Such finding was warranted by the evidence with regard to the sudden and violent starting of the car, which is shown to have disturbed the equilibrium of other passengers as well as the plaintiff. The defendant had accepted the plaintiff for carriage. It collected his fare, and knew the place he occupied upon the car. It was bound to know that the application of motive power in such manner as to cause the car to give a violent jerk was extremely hazardous, in view of the position of many of the passengers upon the car, and might result in injury. The jury were therefore authorized to say that it was a negligent act. Dochtermann *v.* Railroad Co., 32 App. Div. 13, 52 N. Y. Supp. 1051; Schaefer *v.* Railway Co., 29 App. Div. 261, 51 N. Y. Supp. 431.

Same Negligence.

Upon the question of the extent of plaintiff's injuriés, the testimony was conflicting, and, while it is not as satisfactory as it should be, we are unable to find legal ground for disturbing the judgment. No other questions require attention. The judgment should be affirmed.

Judgment and order unanimously affirmed with costs.

CHICAGO, R. I. & P. RY. CO. *et al.*

v.

MARTIN.

(*Supreme Court of Kansas, June 11, 1898.*)

Injury to Passenger—Harmless Error.—A judgment will not be reversed on account of the admission of incompetent evidence where the findings of the jury show that they have discredited such evidence, and that the fact is contrary thereto.

Collisions—Action against Both Companies*—Removal of Cause—Liability—Instruction.—In an action against the C., R. I. & P. Ry. Co. and the receivers of the U. P. Ry. Co., to recover damages for wrongfully causing the death of the plaintiff's intestate while a passenger on the train of the latter company, with which a train of the former collided, where the employees in charge of each train were charged with negligence, and through such negligence jointly causing the death: *held*, first, that after answer by the railway company the receivers are not entitled to remove the cause into the circuit court of the United States, either on the ground of diverse citizenship or that the case is one arising under the laws of the United States, without joinder in the petition for removal by their co-defendant; *held*, second, that where the negligence of the servants of each defendant directly contributed to the death of plaintiff's intestate, both are liable; *held*, third, that where both trains are being operated on the roadway of the U. P. Co., under an arrangement for the joint use of the track by both companies, an instruction that it was the duty of the C., R. I. & P. Co., in the operation of its trains, "to use all reasonable and practicable care and caution as far as human foresight could go under the circumstances to prevent its trains from running into the trains of the receivers of the U. P. Co., which were being operated at the same time over the same track," does not impose too high a duty of care and diligence on the former company; *held*, fourth, where the culpable negligence of the employees of the receivers in charge of their train is clearly established by the special findings of the jury, this court will not consider the question whether they are also chargeable with the negligence of the servants of the C., R. I. & P. Co.

*See note at end of case.

Liability.—The case of Railway Co. *v.* Groves, 44 Pac. 628, 56 Kan. 601, approved and followed.

Limiting Liability.—A stipulation in a stock pass, on which the deceased was riding, in terms limiting the liability of the receivers of the railway company for injuries to him resulting from the negligence of their servants, does not limit the recovery of his administratrix for damages sustained by the widow and children through his death, for which a right of recovery is given to her by section 418, c. 95, Gen. St. 1897.

(Syllabus by the Court.)

ERROR by defendants from Clay county district court. *Affirmed.*

A. L. Williams, *N. H. Loomis*, *M. A. Low*, and *W. F. Evans*, for plaintiffs in error.

F. B. Dawes, for defendant in error.

ALLEN, J. This action grows out of a collision of a freight train of the Chicago, Rock Island & Pacific Railway Company with one of the Union Pacific Company near Linwood, in Leavenworth county, on the 2d of January, 1894, by which William Martin, the plaintiff's intestate, was killed. At the time of the collison six trains were moving eastward over the Union Pacific Railway, in close proximity to each other. They were designated as "Union Pacific No. 14," "Rock Island first 30," "Union Pacific first 12," "Rock Island second 30," "Union Pacific second 12," and "Rock Island No. 32." Union Pacific No. 14 was in the lead, and the others followed in order as above stated. Martin was a passenger in charge of a car load of stock on Union Pacific first 12. All these trains were running an hour or more behind their schedule time. The collision occurred at about 5:30 in the morning, at a point about three-quarters of a mile west of Linwood station. Rock Island train second 30 ran into the rear end of Union Pacific first 12. Westward from the point of collision the track is straight for a distance of 960 feet; thence there is a slight curve to the right for about 306 feet. From the end of this curve it is a tangent for about 6,500 feet. The collision occurrred before daylight on a clear, starlight night. It appears that the trains of the Rock Island Company were operated over the line of the Union Pacific Company between Topeka and Kansas City under some kind of a lease, which was not introduced in evidence. Rules governing the movement of trains were pro- Case Stated.

mulgated by the Union Pacific Company, and the telegraph operators and train dispatchers were employed by that company; but the trainmen on the Rock Island trains were employed by the Rock Island Company. The plaintiff charged negligence in the management of both the colliding trains. The fact that the plaintiff's intestate was killed in the collision was conceded, and there was no serious dispute over the proposition that it resulted from the negligence of the employees in charge of one or the other or both of the trains. Each defendant, however, denied its own liability, and sought to cast the responsibility on the other. The jury rendered a verdict against both for $10,000, on which judgment was entered. They also returned answers to special questions submitted on behalf of each company. In answer to questions submitted on behalf of the Rock Island Company the jury found most of the facts as above stated, and also that as Union Pacific train No. 14 passed it left a burning fusee at or near the west end of the curve above mentioned as a signal to the following train to stop; that Rock Island train No. first 30 answered the signal, and in turn also placed a burning fusee at or near the same point, as a signal to Union Pacific train No. first 12 to stop; that Quick, the engineer of the last-mentioned train, saw the fusee at a distance of a mile and a half away; that it was his duty to answer the signal by two short blasts of the whistle; that he did not answer it in any manner; that, if it had been answered, it would then have been the duty of the conductor and rear brakeman to at once ascertain what signal he was answering; that they could have ascertained what it was in time to protect the rear end of their train by proper signals; that the rules of the company required an engineer seeing a burning fusee on the track to bring his train to a full stop before reaching the fusee, and not proceed until it should be burned out; that Quick did not stop his train, but ran on over the fusee, in violation of the rules; that if Quick had performed his duty by stopping and giving the signals, and if the conductor and rear brakeman had given proper signals to protect the rear of the train, the persons operating the second sections of Rock Island No. 30 could have seen these signals in time to have avoided the collision; that Union Pacific first 12 also ran over and exploded two torpedoes which had been placed on the track as additional warning; that on approaching the burning fusee, and before passing over the same, the trainmen on the Union Pacific first 12 did not send out a flagman, nor

give any signal, to protect the rear of the train from a collision with the following train; that the rules of the Union Pacific Railway Company prescribe the manner in which signals should be used and obeyed by all trains on its road between Kansas City and Topeka; and that the persons employed on the trains of the Rock Island Company while on the Union Pacific track received all orders for the government and operation of the trains from the receivers of the Union Pacific Company. In answer to special questions submitted by the receivers the jury found that the collision occurred about 1,266 feet east of the west point of the curve before mentioned; that the track was straight from the west point of the curve for a distance of about a mile and a quarter; that an engineer on a locomotive situated at the west end of this straight piece of track could have had an unobstructed view of the tail lights on a train located at any point east of him on the straight piece of track; and that the employees of the Rock Island Company on train second 30 could have had an unobstructed and continuous view of the tail lights of Union Pacific train No. first 12 for the distance of about a mile and a half west of the point of collision; that the Rock Island train could have been stopped within from 900 to 1,100 feet from the place where the engineer first saw the tail lights of the Union Pacific train; that he saw the tail lights when within about 1,400 feet of the train; that both the front and rear brakeman of the Rock Island train saw the tail lights when the trains were still further apart, and that the train ran twice its length after the rear brakeman saw the tail lights before he called the attention of any one to the train ahead; that the Union Pacific train was running at the rate of about 10 miles an hour and the Rock Island train about 18 miles an hour at the time of collision; that within a couple of seconds after the engineer of the Rock Island train saw the tail lights ahead of him he saw a lantern swung across the track from the rear of the Union Pacific caboose, which was a signal to him to stop; that he did not answer this signal; that Duplessis, the Rock Island engineer, knew that Linwood was a station where trains were in the habit of taking water, and where telegraphic orders for the movements of trains were given; that he knew three trains were just preceding him, one or all of which were liable to stop at Linwood; that it was the duty of the trainmen in charge of the Rock Island train to approach Linwood station carefully, and with their train under control; that they were chargeable with neg-

ligence in the operation of the train which contributed directly to the collision and the death of the plaintiff; that the train was in charge of Rock Island employees, pulled by a Rock Island locomotive, and that the officials of the Union Pacific did not have anything to do with the movement of the train other than giving orders directing when the train should leave stations; that the Rock Island Company had, and the receivers had not, power to employ and discharge the trainmen operating Rock Island trains over that track.

Separate petitions in error are filed in this court by the Rock Island Company and the receivers of the Union Pacific Company, charging numerous errors, and elaborate briefs are presented on behalf of each, discussing at length the errors alleged. The points appearing worthy of mention in the opinion will be discussed in the order of their statement in the briefs, beginning with those urged by counsel for the Rock Island. The first complaint is of the admission as a deposition of the absent witness A. T. Palmer of the affidavit for a continuance made by R. W. Blair. The statements in the affidavit tended to exculpate the employees in charge of the Union Pacific train from the charge of negligence, and to prove that the engineer in charge of the Rock Island train could have seen the tail lights of the Union Pacific train in time to have prevented the collision. Some of the statements are in the form of conclusions, and it is urged that they were objectionable, both in form and substance. The answers returned by the jury to the special questions, however, show that the jury gave no credence to this testimony so far as it tended to exculpate the Union Pacific employees, for they found the facts to be contrary to the statements in the affidavit. The statement as to the distance at which tail lights could be seen was not necessarily an opinion. By observation the witness might have been, and probably was, able to testify from his own knowledge. The testimony of D. C. Bevard and W. E. Donnally, set out in the brief, appears to be objectionable in form, but the jury in their special findings show that they did not accept it as true, for they found against the statements made by these witnesses. The testimony of Whittaker, of which complaint is made, is quite unimportant. There was no error in the admission of the American Mortality tables. They were shown to be in use, and are recognized as competent evidence to prove the expectancy of human life.

Injury to Passenger—Harmless Error.

Complaint is made of the following instruction: "(10) It

was the duty of the Chicago, Rock Island & Pacific Railway Company in the operation of its trains over the track of the Union Pacific Railway Company between Topeka and Kansas City, with the permission of or under some arrangement with the receivers of the said Union Pacific Company, to see that they were managed and run with reference to all known or reasonably to be anticipated surroundings, and to use all reasonably practicable care and caution as far as human foresight could go under the circumstances to prevent its trains from running into the trains of the receivers of the Union Pacific Railway Company, which were being operated at the same time over the same track. The want of such care and caution on the part of the servants and employees of the Chicago, Rock Island & Pacific Railway Company whom it had placed in charge and control of any of its said trains would be negligence on the part of said company." In criticism of this instruction it is urged that the deceased was not a passenger of the Rock Island Company, and that it owed towards him no greater duty than that of ordinary care; that this instruction imposed on it a much higher degree of diligence, and made it bound to use "all reasonably practicable care and caution as far as human foresight could go under the circumstances." It is contended also that this instruction imposed liability on the Rock Island Company for the negligence or mismanagement of the employees of the Union Pacific Company, who directed the operation of the train. Where two railroad companies operate their trains over the same track, and in the manner shown in this case, the measure of care to be exercised by the employees of one company to prevent injuries to passengers on the trains of the other, stated in this instruction, is not too great. It is not greater than a person of ordinary prudence would exercise under the circumstances. The consequences necessarily resulting from collisions of railroad trains are of such moment that trainmen knowing their proximity are bound to be constantly on the alert, and to exercise the utmost vigilance and promptness in avoiding and preventing such collisions. Common prudence requires this. This instruction does not impose an exceptional or extraordinary vigilance on this particular occasion, but simply requires the exercise of such vigilance as should be exacted of all employees on all trains under like circumstances. In the first paragraph of the instructions the court informed the jury that "the occasion and cause of the death

Collisions Actions against Both Companies Removal of Cause Same Liability Instructions.

of William Martin, as claimed by plaintiff, are stated in detail in the petition filed by her, which has been read in your hearing, and which you may take with you when you go to your jury room." It is said that it is the duty of the court to construe the pleadings, and to state to the jury the issues of fact to be tried by them, and that it is error to send the pleadings into the jury room for the jury to read. This contention is sound, but it does not avail the plaintiff in error, for the court instructed the jury fully and clearly as to the issues to be tried, and the record does not show that the pleadings were, in fact, taken by the jury to their room. A similar criticism is made of the instructions with reference to the rules, though nothing was said about their being sent out with the jury. The claim is, however, that the jury were left to construe them, as well as to determine their applicability to the facts of the case. The rules were promulgated by the Union Pacific Railway Company for the guidance of their trainmen. Those read in evidence were very clear and explicit. It is not apparent that the court by construction could have afforded the jury any additional light on their meaning. Our attention is not called to any point requiring construction by the court. The jury were rightly told that it was for them to determine the applicability of the rules to the circumstances shown to exist by the evidence. There is no merit in the criticism of the thirteenth instruction. Much stress is laid on the refusal of the court to give the second instruction asked by the Rock Island Company, which was to the effect that if the jury found from the evidence that the train second 30 was exclusively controlled and operated under the orders of the receivers, the receivers would alone be responsible for their conduct, even though they believed that the trainmen were employed and paid by the Rock Island Company. This contention has been decided adversely to the plaintiff in error in the case of Railway Co. *v.* Groves, 56 Kan. 601, 44 Pac. 628, with which we are entirely satisfied.

Liability.

On behalf of the receivers the first contention is that a petition and bond for a removal of the cause to the circuit court of the United States for the district of Kansas was duly filed, and the bond approved, but the court refused to order the removal, and that the court thereby lost jurisdiction, and thereafter had no power to proceed. The answer of the Rock Island Company was filed on the 14th of February. The petition and bond of the receivers for removal were filed on the

20th of the same month. The Rock Island Company did not join in the application for removal, but it is now insisted by this company, as well as by the receivers, that the district court lost jurisdiction by the filing of the petition and bond. It is said that the Union Pacific Railway Company has a right to remove causes from the state to the federal courts by reason of a federal court question being involved; that its receivers have a right to remove because of their appointment by the federal court. It is contended that, conceding the right of the plaintiff to sue both defendants jointly, the receivers have a right to remove without being joined in the petition by the Rock Island Company, because the removal is based on the ground that a federal question is involved. It is conceded that, if a right of removal had been claimed solely on the ground of citizenship, it would have been necessary for all the defendants to join; but, being based on the proposition that a federal question was involved, it is claimed that such joinder was unnecessary. In support of this claim the following cases are cited: Ames *v.* State of Kansas, 111 U. S. 449, 4 Sup. Ct. 437; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113; Mitchell *v.* Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840; Railroad Co. *v.* Cox, 145 U. S. 593, 12 Sup. Ct. 905; Railway Co. *v.* Cody, 166 U. S. 606, 17 Sup. Ct. 703; Evans *v.* Dillingham, 43 Fed. 177; Seattle & M. Ry. Co. *v.* State of Washington, 52 Fed. 596; Central Trust Co. of New York *v.* East Tennessee, V. & G. Ry. Co., 59 Fed. 523; Railroad Co. *v.* Townsend, 62 Fed. 161; Landers *v.* Felton, 73 Fed. 311; Lund *v.* Railway Co., 78 Fed. 385. The only ones of the cases cited that seem to us to support this contention are those from 52 and 78 Fed. Our own construction of the federal statute on the subject (Section 2, p. 612, Supp. Rev. St. U. S.) is that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intestate. The controversy was not separable, and the receivers alone had no right to removal on the ground that a federal question was involved. No federal question was in fact presented by the pleadings, nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate. In the view that both defendants must join in the petition for removal we are supported by able federal judges in the cases of Thompson *v.* Railway Co., 60 Fed. 773; Shearing *v.* Trumbull, 75 Fed. 33; and by Railway Co. *v.* Young (Tex. Civ. App.) 27 S. W. 145; Black's Dill. Rem. Causes, § 77.

The deceased was riding on what is denominated a stock pass, which contained the following provision: "This ticket is not issued to the holder hereof as a passenger, but is issued at his special instance and request, in order to enable him to accompany a stock shipment on a freight or stock train, in order to care for the stock *en route;* and the holder hereof agrees that the company shall not be liable to him in any manner as a passenger, nor for any accident resulting to him from the operation of the train in which he rides, or from the manner of handling the same by the employees of the company; and he further agrees that the company shall not be liable to him for injury to the person or property of the person using this ticket, unless the same is caused by the gross negligence of the company; and he further agrees that in no case shall the liability of the company exceed the sum of $1,000." The verdict was for $10,000. Both plaintiffs in error claimed the benefit of this limitation as to liability. This action is not prosecuted by Martin himself nor by his administratrix for the benefit of his general estate. It is an action instituted by his widow as administratrix under section 418, Gen. St. 1897, for the benefit of herself and the children of the deceased. It is to recover their damages resulting from the death of the husband and father. It is to recover for the injury to them, rather than to the deceased. Against their rights the deceased had no authority to contract. The cause of action for which the plaintiff sues never accrued to him. It could only accrue as a result of his death. His stipulation, even if binding on himself, is no defense against the statutory right of the plaintiff.

Limiting Liability.

There was abundant proof of negligence on the part of the employees of the receivers in charge of the train on which the plaintiff was riding, and the findings of the jury sustain the judgment against them. The fact that the crew of the Rock Island train were also negligent has no tendency to exonerate the receivers. The jury have pointed out specific acts of negligence of the engineer, conductor, and brakeman on the Union Pacific train which directly contributed to the collision. This being so, the receivers are liable wholly without reference to the question whether they are also responsible for the negligence of the crew on the Rock Island train. The other questions do not appear to be of sufficient importance to require elaboration here. The liability of both companies was established at the trial. No error is disclosed which

could have affected the verdict. That both train crews were careless, and failed to take reasonable precautions in the management of their trains, is clearly and abundantly shown. The judgment is affirmed. All the justices concurring.

NOTE.

Carriers of Passengers—Collisions—Concurrent Negligence of Carriers—Right of Recovery.—The English rule as announced in Thorogood *v.* Bryan, 8 C. B. 131, 65 E. C. L. 131, held that an action would not lie against a carrier other than the one with which the carrier had contracted for carriage. This doctrine has been criticised in The Nulau, 1 Lush. 386, and was overruled in The Bernina, 12 Prob. Div. 58.

In Pennsylvania the Supreme Court has adhered to the rule as laid down in Thorogood *v.* Bryan. Lockhart *v.* Lichtenthaler, 46 Pa. St. 151. The better rule and that more currently followed, seems to be that where a passenger is injured by the collision with the conveyance of another carrier, caused by the concurrent negligence of the servants of both parties, each carrier is severally liable to pay him the full amount of damage occasioned him by the injury, or that a joint action may be sustained against both. Shearman and Redfield on Negligence, 48; Wharton on Negligence, § 395; Thompson on Carriers of Passengers, 284. Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. Rep. 649. Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 18 Am. & Eng. R. Cas. 184; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186; Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119; Louisville, etc., R. Co. *v.* Case, 9 Bush. (Ky.) 728; Cuddy *v.* Horn, 46 Mich. 596, 41 Am. Rep. 178; Flaherty *v.* Minneapolis, etc., R. Co., 39 Minn. 328, 12 Am. St. Rep. 654; Bennett *v.* New Jersey R., etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435; New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; West Chicago St. R. Co. *v.* Piper (Ill.) 9 Am. & Eng. R. Cas., N. S., 147, and *note*; Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Brown *v.* New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Webster *v.* Hudson River R. Co., 38 N. Y. 260; Dyer *v.* Erie R. Co., 71 N. Y. 228; Covington Transfer Co. *v.* Kelley, 36 Ohio St. 86; Prideaux *v.* Mineral Point, 43 Wis. 513. In Wabash, etc., R. Co. *v.* Shackett, 105 Ill. 364, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166, MR. JUSTICE MULKEY said: "The courts of England and of Pennsylvania, and possibly others to which our attention has not been called, have answered this question in the negative, while the

courts of New York, New Jersey, and Kentucky answer it the other way. Among the text writers, Shearman and Redfield, Wharton, and Thompson all place themselves in line with the latter courts in holding the action will lie." See also Little *v.* Hackett, 116 U. S. 366. A passenger who is himself without fault is entitled to recover for injuries inflicted through the negligence of another company in running into the train of the company that has undertaken to carry him, even though the latter company has been guilty of negligence. Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186. See also The Steamer New Philadelphia, 1 Black (U.S.) 62; Albion *v.* Hetrick, 90 Ind. 145, 46 Am. Rep. 230; Danville, etc., Turnpike Road Co. *v.* Stewart, 2 Metc. (Ky.) 119; Bennett *v.* New Jersey R., etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435; Chapman *v.* New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Wylde *v.* Northern R. Co., 53 N. Y. 156; Robinson *v.* New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1. In Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. Rep. 209, 4 U. S. App. 109, it is *held* that if the negligence of two railroads concur in producing a collision and endangering a passenger, where their tracks cross, each company is liable for full damages. They are both bound to the same degree of care, and hence it is proper for the court to refuse an instruction at the instance of one defining the duty of the other in approaching the crossing and making it liable if it fails to discharge the duty.

COLE

v.

ATLANTA & W. P. R. CO.

(*Supreme Court of Georgia, Aug. 5, 1897.*)

Carriers of Passengers—Insults to Passenger—Right of Action.*—It is unquestionably the duty of a railroad company to protect a passenger against insult or injury from the conductor of the train on which the passenger is riding; and, this being so, the unprovoked use by a conductor to a passenger of opprobrious words and abusive language, tending to cause a breach of the peace, or to humiliate the passenger, or subject him to mortification, gives to the latter a right of action against the company.

(Syllabus by the Court.)

*See note at end of case.

Cole *v.* Atlanta & W. P. R. Co

ERROR by plaintiff from Coweta county superior court. *Reversed.*

W. H. Bingham, *W. L. Stallings*, and *D. B. Whitaker*, for plaintiff in error.

Dorsey, Brewster & Howell, for defendant in error.

FISH, J. The plaintiff's petition set forth a cause of action. "Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary." Railroad Co. *v.* Turner, 72 Ga. 292, 294. Accordingly, a plaintiff is entitled to recover damages for an assault made upon him, and "when to this are added other wrongs and violations of rights and duties; when he was insulted and vilified by their agents while under their protection; when they failed to exercise the 'extraordinary diligence' which the law requires at their hands for his safety and comfort,—surely these are circumstances entitling him to compensatory damages, as well for wounded feelings as for the inconvenience, pain, and suffering for this wanton and cruel violation of his rights by the conductor and his assistants." Railroad Co. *v.* Olds, 77 Ga. 681; Railroad Co. *v.* Condor, 75 Ga. 55; Gasway *v.* Railroad Co., 58 Ga. 216, 220. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." Head *v.* Railway Co., 79 Ga. 360, 7 S. E. 217. "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. * * * He must not only protect his passenger against the violence and insult of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable

that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal and profane. The best security the traveler can have that these servants will be selected with care is to hold those by whom the selection is made responsible for their conduct." Goddard *v.* Railway Co.,57 Me, 213, 214, followed and approved in Hanson *v.* Railway Co., 62 Me. 84. The greater part of the above extract is quoted and adopted as the text in Hutchinson on Carriers (section 596). See, also, Ray, Neg. Imp. Duties (Pass. Carr.) 340; Booth, St. Ry. Law, § 372. "The carrier's liability is not confined to assaults committed by its servants, but it extends also to insults, threats, and other disrespectful conduct. Thus, a street-railway company is liable for the act of its driver in falsely charging a passenger, in the hearing of others, with passing counterfeit money in payment of fare, and in threatening him with arrest. So, if the master of a vessel forcibly drives the passengers out of the cabin; if he compels them to lodge with the common hands; if, by his indecency, rudeness, or brutality, he shock the modesty of a female passenger, so as to oblige her to quit the cabin, or as to render the passage comfortless, by a continued series of vexation, misery, and torment,—both he and his employers are liable." 2 Fetter, Carr. Pass. § 366, citing Lafitte *v.* Railroad Co., 43 La. Ann. 34, 8 South. 701; Keene *v.* Lizardi, 5 La. 431; St. Amand *v.* Lizardi, 4 La. 244. In this connection, see, also, Campbell *v.* Car Co., 42 Fed. 484, affirmed by United States supreme court in 154 U. S. 513, 14 Sup. Ct. 1151; Railroad Co. *v.* Blocher, 27 Md. 277; Craker *v.* Railway Co., 36 Wis. 657; Bryant *v.* Rich, 106 Mass. 180; Railroad Co. *v.* Whitman, 79 Ala. 328; Railroad Co. *v.* Flexman, 103 Ill. 546; Railroad Co. *v.* Jackson, 81 Ind. 19.

On the argument here, it was practically conceded by the distinguished counsel who represented the railroad company that, under the facts alleged, there had been a violation and disregard of the duty which the company owed to its passengers. Yet it was contended the plaintiff did not allege facts

"showing any assault, and the only thing charged is that the conductor used insulting words, making no assault, and the only injury claimed to have been received [was] injury to feelings;" and accordingly the argument was presented that, although "wounded feelings may be treated as an element of damage," where a passenger has been wrongfully ejected or assaulted, still an action will not lie unless "there has been an injury to the 'person or purse,'" of a passenger who had been ill treated at the hands of the carrier's agents. In other words, counsel stated their understanding of the question presented by the present record to be: "Does the law afford any redress for wounded feelings, unaccompanied by any injury to the person or purse?" They strenuously insisted to the contrary, and in this connection relied on the case of Chapman *v.* Telegraph Co., 88 Ga. 763, 15 S. E. 901, wherein it was held that "a person to whom a telegraphic message was addressed and sent, informing him of the desperate illness of his brother, and requesting him to come, is not entitled to recover of the telegraph company damages on account of mental pain and suffering, alleged to have resulted to the plaintiff from failure of the company to deliver him the message in due time and from delaying delivery till too late to take the last train available for reaching the brother before his death occurred."

We recognize the soundness of the doctrine laid down in that case, and that it directly sustains the proposition for which it is cited. Obviously, however, it has no application to a case such as the one at bar. Conceding that the plaintiff entirely fails to allege facts showing that an actual, physical assault was made upon him, still the allegations of his petition affirm, in unequivocal terms, a most wanton and inexcusable injury to his person, *viz.* a flagrant attack directed towards his reputation. The right to personal security comprehends and includes security in one's reputation, as well as in his life, limb or liberty. Clearly, under the facts alleged, a suit would lie against the company's servants themselves for malicious slander, and the company has utterly failed in its duty to protect its passenger from insult, abuse, and ill treatment of a nature which the law thus recognizes as furnishing the basis of an action calling for damages calculated to deter a wrongdoer. The gist of the present complaint is that the company, though legally bound to protect and shield from attack the plaintiff's person, suffered him to undergo the pain an mortification of being publicly denounced, in coarse and

brutal language, as one who was dishonestly attempting to "dead-beat" his way, and who had gone through the form of swearing to what he knew to be wholly false in order to effect his purpose. While this was a wanton act of commission by a servant of the company, it was also a negligent omission on the part of its servants to perform towards the plaintiff a duty imposed by law upon their master.

The distinction just pointed out is clearly recognized in Chapman's Case (page 772, 88 Ga., and page 903, 15 S. E.) wherein it is said: "The law protects the person and the purse. The person includes the reputation. Johnson *v.* Bradstreet Co., 87 Ga. 79, 13 S. E. 250. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence." Again on page 767, 88 Ga., and page 902, 15 S. E., it is expressly said that the doctrine contended for did not apply to actions for libel or slander, for "malice [express or implied] is an essential element in such cases"; and, "where the words are actionable *per se*, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency."

We do not, of course, wish to be understood as dealing with the present action as though it were an attempt to sue the company for a slander committed by its agents. On the contrary, we merely mean to hold that a carrier is liable in damages for failure to perform its public duty to protect a passenger from abusive language which amounts to slander, not as the perpetrator of the outrage itself. Indeed, it matters not whether a servant or a stranger was the real wrongdoer, if the company has failed to furnish the passenger with the proper protection against such misuse; for, in either event, its liability will result from its breach of a public duty, not because the real wrongdoer's act is in law imputable to it. As has been seen, when the company's servant to whom it intrusts the performance of its duty to protect its passengers is himself the tort feasor, it is bound to respond in damages simply because it cannot escape liability by delegating its duties to another, who abandons his office at the critical moment, and thus places the company in the attitude of having no one on the scene to perform for it the duty, it having entirely failed to provide

for the emergency by choosing to rely solely upon a servant who proves unworthy of the trust. In a word, the company's liability arises from an act of omission, and it is not chargeable with the wanton act of commission on the part of its servant from which the passenger suffers injury to his reputation. For the reasons above stated, we think the trial judge erred in dismissing the plaintiff's petition, which certainly was good as against a general demurrer. Judgment reversed.

NOTES.

Right of Passenger to Recover for Insults and Abuse.—Indecent and abusive language, or rude and insulting conduct on the part of the servant of a carrier, will entitle a passenger to recover damages. Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499; Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 16 Am. & Eng. R. Cas. 335; Dawson *v.* Louisville, etc., R. Co., (Ky. 1883) 11 Am. & Eng. R. Cas. 134; Block *v.* Bannerman, 10 La. Ann. 1; Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277; Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421. See Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 28 Am. St. Rep. 632, *affirming* 60 Hun. (N. Y.) 579, 39 N. Y. St. Rep. 23.

"Among these recognized rights of the passenger is not only to be safely and promptly carried to his destination, but to be treated by the servants and agents of the carrier with kindness, respect, courtesy, and due consideration, and to be protected against insult, indignity and abuse from both the agents and other passengers." McGinnis *v.* Missouri Pac. R. Co., 21 Mo. App. 399.

In Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17, it was held that a passenger might recover damages when it was shown that he was abused and vilified in coarse, indecorous, and profane language by the driver of a street car who was also acting as conductor because, as the driver alleged, the passenger had not paid his fare.

MOSS

v.

NORTH CAROLINA R. CO.

(*Supreme Court of North Carolina, March 22, 1898.*)

Negligence—Instructions.*—It is reversible error to charge as to a feature of negligence not alleged in plaintiff's pleadings.

*See note at end of case.

Moss *v.* North Carolina R. Co

APPEAL by defendant from Alamance county superior court. *Reversed.*

F. H. Busbee and *A. B. Andrews, Jr.*, for appellant.
E. S. Parker, Jr., *A. W. Graham*, and *J. A. Long*, for appellee.

FAIRCLOTH, C. J. The plaintiff sues for personal injury caused by the alleged negligence of the defendant. The plaintiff entered defendant's passenger car at Oxford en route to Chapel Hill, N. C. At University station, on said line, it was necessary to change cars, and take the Chapel Hill train which stood out some short distance from the station where the train on which the plaintiff came usually stops. The complaint alleges: "That when the train upon which they came [the plaintiff and her mother] reached the said University station that it did not stop, but continued moving slowly by said station; that the said Parry Lee Moss, accompanied by her mother, came upon the platform of the car in which they were, and that the conductor of said train commanded them in an angry and vehement way to get off if they were going to get off, and that at the said command the said Parry Lee Moss immediately descended from said train, and that while she was in the act of so descending the speed of said train was suddenly accelerated; and that, owing to the failure of the said train to stop at said University station, and to the sudden and careless acceleration of the speed of the said train, and owing to the command of said conductor, that the said Parry Lee Moss was thrown under the train, and her feet crushed, to her great damage," etc. These allegations were denied, and there was conflicting evidence on each material point.

First issue: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" The charge was at length, and numerous prayers for instructions and exceptions were made in the course of the trial. Among other things, his honor charged the jury: "That, the plaintiff being a passenger on the defendant's train going from Oxford to Chapel Hill, and it is being necessary for the plaintiff to change cars at University station, that while she was going from the train on which she came to the said station, or from said station to any other train, she was still a passenger; and that if she was injured by the failure of the company to direct and show her the safe way to go from one train to

another, or from any train to the station, or from the station to any train, then the company is guilty of negligence, and you should answer the first issue 'Yes.'" Exception by defendant. The above part of the charge was erroneous, and, without intimating any opinion on the abstract question of law involved in the above-quoted part of the charge, we find the error to consist in charging on a feature of negligence not alleged in the complaint. A defendant is called upon to answer the accusations made against him, but he is not called upon, and it would be unreasonable to do so, to anticipate and come prepared to defend any other accusation. It is a settled maxim of law that proof without allegation is as unavailable as allegation without proof. There is nothing in the answer to assist the complaint, if the facts were as the charge assumes them to be. Conley *v.* Railroad Co., 109 N. C. 692, 14 S. E. 303. "A complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory." 4 Elliott, R. R. §. 1594. Several interesting questions were discussed before this court. Some of them do not arise out of the pleadings, and some do so only incidentally. We cannot see that it would serve any useful purpose to consider them at present. The judgment below is reversed, and a new trial is awarded. New trial.

NOTE.

Negligence—Instructions.—The instructions in an action for negligence should confine the jury to the negligence alleged in the petition. Dahlstrom *v.* St. Louis, I. M. & S. R. Co., 35 Am. & Eng. R. Cas. 387, 96 Mo. 99, 8 S. W. Rep. 777, 15 West. Rep. 85; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509, 10 S. W. Rep. 66; Woodward *v.* Oregon R. & N. Co., 18 Oreg. 289, 22 Pac. Rep. 1076; Chicago, B. & Q. R. Co. *v.* Wells, 42 Ill. App. 26; Chicago, B. & Q. R. Co. *v.* Avery, 17 Am. & Eng. R. Cas. 649, 109 Ill. 314, *aff'g* 10 Ill. App. 210.

STATE

v.

REED.

(*Supreme Court of Mississippi, Dec. 19, 1898.*)

Power of Carriers to Grant Exclusive Privileges at Station.*—Railroad companies cannot grant to certain hackmen the exclusive privilege of driving their hacks within the enclosures surrounding their depots and soliciting passengers therein, and thereby prevent competition, to the injury of the public.

APPEAL by state from Warren county circuit court. *Affirmed.*

McWillie & Thompson, for the State.
R. L. McLaurin, for appellee.

WOODS, C. J. Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railroad Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was by the judgment of that court acquitted of the charge and discharged. From this judgment of the circuit court, the state prosecutes this appeal.

From the agreed statement of facts it appears that the depot of the railroad company in the city of Vicksburg is surrounded by a fence, and that there is a "considerable inclosure of grounds adjacent thereto." It further appears,also, that "within said inclosure around the depot is the most convenient and best place for hackmen and busmen to discharge, solicit, and receive passengers departing and arriving on the passenger trains of said company, and that any hackman or busman who had the exclusive privilege of entering this inclosure and soliciting passengers there would have an advantage over hackmen or busmen excluded therefrom, so far as passengers

*See Perth Gen. Station Committee *v.* Ross (App. Cas.) 8 Am. & Eng. R. Cas., N. S., 639, and *notes*, p. 660 *et seq.*

arriving on said trains were concerned." These facts, moreover, appear in the agreed statement, *viz*: That the railroad company granted in June, 1894, the exclusive privilege of entering said inclosure and soliciting passengers therein to said Peine, and that Peine was a person engaged in the hack, bus, and general transfer business in Vicksburg,and that, after said exclusive grant to Peine, all other hackmen and busmen were excluded from entering said inclosure for the purpose of soliciting passengers therein, and were notified not to enter said inclosure for that purpose under threat of being prosecuted as trespassers; that the appellee, Reed, after having been notified not to enter said inclosure for such purpose, drove his hack into the inclosure, and while therein solicited and received a passenger, and then drove away, and that in doing this he created a disturbance or disorder; that Cherry street is about 150 feet from the depot, and that from the depot to Cherry street, where hacks, other than Peine's, can stand, there is a good sidewalk. In a word, Peine's hacks have the exclusive privilege of entering the inclosure surrounding the depot and soliciting incoming passengers, while all other hacks are excluded from the inclosure, and must stand outside and about 150 feet from the depot, and in an open street.

It is admitted in the agreed statement that any hackman or busman having the exclusive privilege of entering said inclosure, and soliciting passengers there, would, to that extent, have an advantage over hackmen or busmen excluded therefrom, so far as concerned incoming passengers. The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. Says the agreed statement: "It is contended that the said company had the right to make the said contract, and thus exclude the defendant and others than the said Peine from the said inclosure, and to grant to the said Peine the exclusive right to enter the said inclosure for the purpose of there soliciting passengers for his hack line. Defendant controverts this position, in so far as it is claimed that the said company can grant the exclusive right to any particular person to enter the said inclosure with his hack, and there solicit passengers, and contends that the railroad company must exclude all or admit all into the said inclosure, so long as they conduct themselves in an orderly and peaceable manner." The single issue is thus sharply defined, *viz:* Has a railroad the right to confer upon one hackman the exclusive privilege

of entering with his hacks its inclosed station-house grounds, and of soliciting incoming passengers, and to exclude all others from the inclosure, such privilege conferring advantages upon the favored hackman, and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded 150 feet from the depot, and in an open street? The question has never before been presented in our courts, but it is by no means a new one, and has been passed upon in other jurisdictions. Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds, yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchandise, and at the same time exclude all others. The question is one that affects not only the excluded hackmen; it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds. other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and in the end to create a monopoly of such business, not granted by its charter, and against the interests of the public. These are the views ably urged in Hack Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667; Railway Co. *v.* Langlois, 9 Mont. 419, 24 Pac. 209; Cravens *v.* Rodgers, 101 Mo. 247, 14 S. W. 106; and McConnell *v.* Pedigo, 92 Ky. 465, 18 S. W. 15. These are the views held, too, by the three dissenting judges in the case of Railroad Co. *v.* Tripp, 147 Mass. 35–41, 17 N. E. 89. The majority of the judges in that case held that a railroad might grant to one an exclusive right to solicit the patronage of incoming passengers; but this is the only American case making that distinct holding, and that opinion was delivered by four judges, the other three members of the court vigorously dissenting, and with better show of reasoning, in our judgment. The cases of Barney *v.* Steamboat Co., 67 N. Y.

301, Fluker *v.* Railroad Co.,81 Ga. 461, 8 S. E. 529, and Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, do not present the precise point involved in the case before us. They are all decisions of other questions, and can be readily distinguished from the case in hand. Counsel for appellant think that in Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, the supreme court of Michigan has swung away from the doctrine announced in the earlier case of Hack Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667. But that very able court did not so think, and was careful to disabuse the mind of counsel, who seems to have the notion which counsel here puts forward, and the court clearly distinguished the two cases. We are of opinion that the railroad had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.

HAUG

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of North Dakota, April 28, 1898.*)

Carrying Passenger beyond Station—Expulsion of Intoxicated Passenger from Depot Resulting in Death.*—Defendant received plaintiff's husband as a passenger, but negligently carried him by his station. When the train reached the next station he was put off, against his wishes. He was in an imbecile and helpless condition from intoxication, and this was known to defendant's employees. It was late at night, and the weather was stormy, and bitterly and dangerously cold. There were no proper accomodations for travelers at the place except defendant's depot, and shortly after entering the same to wait for a train to take him back to his destination, and while conducting himself quietly, he was ejected from the depot, and driven out into the night, with all its perils for a

*As to Duty of Carriers to Intoxicated Person, see Edson *v.* Southern Ry. Co. (Miss.), 11 Am. & Eng. R. Cas., N. S., 832 and *note* p. 833 *et seq.*

man in his condition. As a consequence, he died from exposure. *Held*, that the defendant was liable in damages to his widow for his death.

On Rehearing.

Action by Widow—Damages—Pleading.—In an action brought under the statute by a widow to recover damages for the wrongful killing of her husband, where the complaint shows that the deceased left, surviving him, a widow and minor children of tender years, no specific allegations showing that such widow and children suffered pecuniary damages by the loss of such life are required.

(Syllabus by the Court.)

APPEAL by plaintiff from Traill county district court. *Reversed.*

B. E. Ingwaldson, for appellant.
W. E. Dodge, for respondent.

CORLISS, C. J. It is difficult to discover from the complaint or the plaintiff's brief the precise legal theory on which she seeks to sustain this action. Our first impression was against the sufficiency of the complaint which has been thus far successfully attacked by demurrer. But on a more careful analysis of its averments, and after eliminating therefrom all immaterial allegations which tend only to obscure the question of liability, we are convinced that the plaintiff has disclosed a state of facts which establish such a breach of duty on the part of the defendant as renders it responsible to her in damages. The general theory of the action is that defendant's violation of its duty to plaintiff's husband was the cause of his death, and that, therefore, it is bound, under sections 5974–5976, Rev. Codes, to make good to her the damage she has thereby suffered.

As the question arises on demurrer, we are concerned with nothing but the averments of the plaintiff's pleading. Do they state a cause of action? Stripped of all unnecessary verbiage, they are, in substance, as follows: That plaintiff is the widow of Jacob C. Haug; that he left, him surviving, the plaintiff and four minor children, who live with plaintiff; that defendant is a railroad corporation; that on the 2d day of February, 1895, defendant received plaintiff's husband as a passenger for transportation from Hillsboro to Alton station, in this state; that it negligently carried him by his point of destination; that he was in an imbecile condition from drink, and was helplessly intoxicated, to the knowledge of

the defendant and its employees; that on reaching the station next south of Alton, *i. e.* the village of Kelso, the defendant put him off its train, against his wishes; that it was then late in the night, and was stormy and dangerously cold; that at this village there were no proper accommodations for travelers except defendant's depot; that shortly after plaintiff had entered such depot, and while he was quietly waiting for the next train to take him back to Alton, to the knowledge of defendant's agent, and while he was still in such imbecile condition from drink, and helplessly drunk, to the knowledge of such agent, such agent wantonly ejected him from the depot, and drove him out into the night; that it was dangerously and bitterly cold and stormy; that to compel a person, and especially one in his condition, to leave the waiting room, was inhuman, and was to evidently and apparently endanger his life; that plaintiff, so denied all shelter, was forced to and did attempt to walk back towards Hillsboro, the only place where he could find shelter, and that after hours of walking he finally succumbed to the cold, and died from exposure.

If these facts do not create a liability, it must be because the law deems human life cheap. In the forum of conscience, any human being would be instantly condemned who should treat a helpless drunkard as the deceased was treated by the defendant. The acts of defendant are none the less indefensible because they were performed, as all corporate acts must be performed, by agents. Does, then, the law lag so far behind ethics that conduct like this, which shocks the moral sense, is nevertheless sanctioned by legal principles? We are gratified to find that this question can be answered in the negative. The ground of liability in this case is the disregard by defendant of human life while in the performance of a legal right. When defendant negligently carried plaintiff past the station to which he was bound, it became liable to him for breach of its contract, and was under obligations to return him to that place, without charge. But there is no connection between this negligent act and the death which thereafter resulted. Such act was not the proximate cause of his death. Had defendant carried him to a place of safety, and had he died from cold because of his intoxicated condition, no liability would have existed. Nor do we wish to be understood as holding that defendant was obliged to carry him without pay to any point to which he might express a desire to be transported. A traveler who buys a ticket at St. Paul for Minne-

apolis cannot, when negligently borne beyond his destination, demand that he shall be given a free ride to the Pacific coast. The railroad company has rendered itself liable for its breach of contract, but it has not incurred the obligation to carry the passenger any further than it would be obliged to carry any other passenger who has no ticket and refuses to pay his fare. The duty to carry the traveler, who has been taken past his station through the negligence of the carrier, to a place where his life will not be imperiled, may perhaps be greater than the duty to a willful trespasser, who is conducting himself with violence on the train. But, in a general sense, his right to continued transportation is no greater. He must either pay or leave the train when a point has been reached where he will not be exposed to great hazard. Plaintiff in this case cannot complain of the mere fact of the ejection of her husband from the train at Kelso. It is because of the peculiar circumstances surrounding that act, and which made it one necessarily dangerous to human life, when considered in the light of the subsequent conduct of defendant in forcibly removing him from its depot, that the plaintiff may justly hold defendant responsible for the terrible consequences which ensued. To have put him off the train where there were hotel accommodations would have been justifiable, because the defendant was not bound to carry him until he had become sober. Had he, after being ejected at such a place, been run over and killed in the street, or been frozen to death because of his state of intoxication, defendant could not be held responsible. But no one would contend that it could put him off from the train while in motion. And yet why is this so? The underlying principle applicable in such a case is that a railroad company must not,even when exercising the lawful right of removal, so act as to jeopardize human life. On the same principle, it could not set the passenger out in the midst of a storm on a cold night on the prairie or at a flag station. Neither would the law sanction its act in ejecting him under such circumstances at a station where there were no accommodations for travelers, and where the depot was closed. The defendant in this case owed to plaintiff's husband the duty of carrying him to a point where he, helpless from drink, would not be shelterless against the pitiless fury of a storm, on a bitterly cold night. Whether he was left on the lonely prairie between stations, or at a flag station where there was no depot, or at a village where he could not find shelter except at defendant's depot,

which was closed to him or shelter in which was denied to him, the fact would in all the cases be the same,—that it had placed him, a man helplessly intoxicated, to its knowledge, and whom it had negligently carried beyond his destination, in a position from which death or great bodily injury was almost certain to result. The defendant could not expect that a stranger in a place, much less one in such a state of intoxication, would be permitted to enter a private house. It was chargeable with knowledge that his condition was such that he might not even have sufficient control of his faculties to make an effort to do so. It was therefore bound when, despite his protests, it removed him at Kelso, to see to it that the station agent was apprised of the facts, and directed to allow him shelter in its depot until he could be carried back to the place where the defendant should, in the exercise of reasonable care, have originally left him. We do not mean to intimate that it is incumbent upon a railroad company to keep its passenger stations open at all hours of the day and night. And if, under ordinary circumstances, the depot building is closed to the public except when it is necessary it should be open to accommodate the public, no one has any ground for complaint. Assuming that defendant has a right to close its depot as against the general public at the time plaintiff's husband was ejected therefrom, and assuming, further (but the complaint leaves this point in doubt), that what the defendant's agent did in removing her husband was only incidental to the act of closing the depot for the night, yet as against him the defendant had no right to close the depot. When its train reached Kelso with this helpless man on board, because of its own carelessness, it was bound, in view of the climatic conditions and the non-existence of shelter at that point except in its own depot, to decide whether it would leave him there, in a place of safety, or carry him further, to another place of safety, and, when once it determined to put him off at that point, there sprung up the obligation not to take from him the only shelter the place afforded. If this shelter was to be denied him, then it was inhuman to drop him at that station at all. It would be in no respect different from leaving him where the depot was already closed, or where there was no depot at all, or at a flag station, or between stations upon a shelterless plain. The wrongful act of the defendant would be in not guarding against the possibility that the station agent, ignorant of the facts, might close the depot, and thrust the unfor-

tunate man, in his helpless condition, out into the dangerous storm. Defendant cannot escape liability because the conductor, without any thought of the dangers of the position of this helpless man, failed to apprise the station agent that the defendant, having carried him by his station, was bound to see that he was not placed in a situation of peril, and that, therefore, he (the agent) must give him shelter in the station. His intoxication was not the proximate cause of his death. It was, it is true, the cause of the defendant being required to exercise greater precaution as to the place of his removal from the train than if he had been sober. The man who voluntarily incapacitates himself by drink is not on this account an outlaw. The law deems his life as precious as that of an Emerson. When the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril even in exercising its undoubted right to eject him ; and, in declaring whether he will be subjected to peril, not only must climatic conditions, the propinquity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent of the carrier. Though the intoxication of the deceased did cast upon the defendant greater precaution in seeing to it that his life was not imperiled, yet it was not the cause of his death. That cause was the wanton act of the defendant's agent in unnecessarily exposing him, in a state of helpless intoxication, to the cold and storm of a bitter wintry night. The defendant has not even the excuse that it had no chance to prevent his taking passage on its train in this drunken state, for it is averred that his helpless and imbecile condition was known to the company at the time it accepted him as a passenger. There is ample authority for our decision that the facts alleged disclose liability.

In Railroad Co. *v.* Johnson (Ala.) 19 South. 51, it appeared that plaintiff's intestate, who was a passenger on one of its night trains, was very drunk, and refused to pay his fare. Thereupon he was ejected in a cut of the road where there was no escape, except up or down the track, along the sides of which there was room for a person to walk. The night was dark and it was raining. At the south end there were cattle guards, which could be passed only by walking

on the track. Here he was struck, and killed by a train. It was held that the company was liable. The court said: "If a passenger on a train is intoxicated to a degree to render him unconscious of danger, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place. Tanner *v.* Railroad Co., 60 Ala. 621; Isbell *v.* Railroad Co., 27 Conn. 393; Kerwhaker *v.* Railroad Co., 3 Ohio St. 172; Railroad Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Johnson *v.* Railroad Co., 58 Iowa, 348, 12 N. W. 329; Kline *v.* Railroad Co., 37 Cal. 400; 3 Wood, Ry. Law, §§ 363, 364; Shear. & R. Neg. § 493, 2 Am. & Eng. Enc. Law, 748." Again, the court said: "It is opposed to authority and reason, and the common instincts of humanity, to allow, because a passenger is intoxicated, whether to a greater or lesser degree, and misbehaves in a manner authorizing the conductor to expel him from the train, that such expulsion may be made without the exercise of due care for the safety of the passenger, having reference to time, place, and surroundings. If expelled without the exercise of such reasonable care for his life and limb, and he is injured in consequence, the company will be liable, notwithstanding the fact if the passenger had not been drunk he would not have misbehaved, and if he had not misbehaved he would not have been expelled and injured. The right to make reparation rests upon the moral obligation resting upon every one so to exercise his own rights as not to injure another. As was well expressed in Isbell *v.* Railroad Co., *supra*: 'A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incidental to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances, to the

imminency of the danger, the evil to be avoided, and the means at hand for avoiding it.'" When this case was before the court on a former appeal (16 South. 75) the court said: "There is another principle of law to be observed, which requires of all persons, in the exercise of a right or the performance of duty, that it be done with reasonable regard to the preservation of life, and prevention of great bodily harm, or the infliction of unnecessary injuries to others, and they will be held responsible for the manner in which the right is exercised or duty performed. It is an exceptional case where the law does not subordinate personal rights to the preservation of life. A conductor has the right, under proper circumstances, to eject a passenger from a car; but he would not be justified in exercising this right while the car was at a high rate of speed, or when upon a high trestle, nor would he be justified in putting off a person who was blind or deaf, knowing his infirmity, except at a safe place. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place, and under conditions and circumstances, which would expose him unnecessarily to great peril of life or bodily harm; and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor, under such circumstances, that constitutes the act culpable or willfully wrong. If the deceased was intoxicated to the degree that he was unconscious of danger,—could not grasp his position and surroundings, and his duty to avoid danger from passing trains,—or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages resulting from such misconduct, although the deceased may have been a trespasser on the train, and might have been legally ejected, in a proper manner and at a proper place."

In Railroad Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186, it was held that the defendant was liable when it expelled from its cars, because he refused to pay his fare, a passenger who was helplessly drunk, the defendant knowing of his condition, he being expelled, not at a station, but in the

snow. As a consequence of this expulsion at such a place he was severely frozen, and the defendant was held liable therefor.

In Railroad Co. *v.* Valleley, 32 Ohio St. 345, the court said: "It might, perhaps, as far as this case is concerned, be conceded that, if a man were so intoxicated as to be without reason, sense or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And, further, to put a man off in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction, this could find no justification in law. All this might possibly be."

In Railroad Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, the court say, at page 554, 33 Kan., and page 884, 6 Pac.: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried the case: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers, but, when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.'"

In Conolly *v.* Railroad Co., 41 La. Ann. 57, 5 South. 259, and 6 South. 526, the court said: "But none of those cases hold that this right of exclusion can be exercised inhumanly, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

In Railroad Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70, the court, referring to some of the cases already cited, said: "These are cases—extreme ones, it may be,—illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that

those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness."

In Roseman *v.* Railroad Co. (N. C.) 16 S. E. 768, the court said: "But where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood, Ry. Law, § 362; 2 Shear. & R. Neg. § 493; Railroad Co. *v.* Wright, 68 Ind. 586."

In Brown *v.* Railroad Co., 51 Iowa, 235, 1 N. W. 487, the court said: "In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised all the circumstances should be considered, as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that the ejection shall occur at such place, and be prosecuted in such manner, as not unreasonably to expose the party to danger."

JUDGE ELLIOTT says, in his work on Railroads (section 1637): "If he is so intoxicated or so young or feeble as not to be able to take care of himself or look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place, and under such circumstances, that he will be exposed to unnecessary peril."

All the cases which recognize the right of the carrier to eject the passenger who has no ticket and refuses to pay his fare, assert that this right must be exercised in such a manner as not to imperil the life of the passenger, or subject him to danger of bodily injury. See, as supporting this principle, the following decisions, which are more or less in

point; Railroad Co. *v.* Glass, 60 Ga. 441; Railroad Co. *v.* Gilbert, 64 Tex. 536; Railroad Co. *v.* Rosenzweig, 113 Pa. St. 519, 6 Atl. 545; Ham *v.* Canal Co., 155 Pa. St. 548, 26 Atl. 757; Rudy *v.* Railroad Co., 8 Utah, 165, 30 Pac. 366; Gill *v.* Railroad Co., 37 Hun. 107; Railroad Co. *v.* Skillman, 39 Ohio St. 444; Railroad Co. *v.* McDonald, 2 Wilson, Civ. Cas. Ct. App. 144; Hall *v.* Railroad Co., 28 S. C. 261, 5 S. E. 623; Wyman *v.* Railroad Co., 34 Minn. 210, 25 N. W. 349. See, also, Weymire *v.* Wolfe, 52 Iowa, 533, 3 N. W. 541; Isbell *v.* Railroad Co., 27 Conn. 393.

The complaint shows with sufficient clearness that the death which resulted was proximately caused by the defendant's wrongful act. The order sustaining the demurrer is reversed. All concur.

On Rehearing.

(Nov. 12, 1898.)

BARTHOLOMEW, C. J. There is one question involved in this case that was not disposed of in the original opinion. It was not mentioned in the oral argument upon the first hearing, and, while it was briefly treated in respondent's brief, yet we overlooked it, and hence, on respondent's petition, we ordered a reargument.

It is urged that the complaint contains no specific allegations showing that this plaintiff or the heirs of Jacob C. Haug have suffered any pecuniary loss or damage by reason of his death, and that only actual pecuniary damages can be recovered in an action of this character, and that the law does not presume damages from the single fact of death; hence, unless the complaint contains specific averments of damages, it fails to state a cause of action. It will be noticed that the cause of action in this case, if any there be, accrued on February 3, 1895. The Compiled Laws of 1887 were then in force. The action was not commenced until 1897. The Revised Codes of 1895 were then in force. The cause of action here sought to be enforced was unknown to the common law, and hence must depend entirely upon statutory provisions, and the provisions giving this right of action, as set forth in section 5499 of the Compiled Laws, differ somewhat from the provisions giving the right of action, as set forth in section 5974, Rev. Codes. We are not prepared however, to say that the rule of pleading would be different under the one statute or the other. But, if there be a difference in liability under the two statutes, then, clearly, under the provisions of section 5142, Rev. Codes, this action

must be regarded as brought under the provisions of section 5499, Comp. Laws, which was in force when the cause of action accrued. That section reads: "If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants or employees, then the widow, heir or personal represesentatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid." That was the modified form, in force in this jurisdiction, of Lord Campbell's act, passed in 1846, which first brought causes of action of this character into existence. Statutes based upon Lord Campbell's act are now in force in nearly or quite all of the states in this Union. This statute has been often before the courts, and this very question of pleading which we are now considering has been repeatedly passed upon. The question is new in this jurisdiction, and, when we consult the adjudged cases, we find them to be in some confusion, and perhaps some conflict. Difference in phraseology may account in part for the diversity of opinion among judges, but we think there are cases that cannot be reconciled. Upon one point the cases are united, and that is that the only damages recoverable in this action are for the pecuniary loss. Nothing can be recovered for the loss of society or for damages in the way of *solatium*. But the cleavage in the authorities arises upon the question of the presumption of any pecuniary damages arising from the fact of death.

The first case in England wherein the point arose is Chapman *v.* Rothwell, El., Bl.& El. 168. In that case the declaration was filed by the husband, as administrator, to recover damages for the death of his wife. The allegations simply set forth the facts showing the negligence of defendant resulting in the injury and death of the wife, and added: "And the plaintiff, as administrator as aforesaid, claims 200 pounds." There was a demurrer to the declaration. Lord Campbell, the author of the act giving the right of action, was then chief justice. Upon the argument of the demurrer the attorney for the defendant made the statement that "no pecuniary injury is shown to have accrued to the plaintiff." LORD CAMPBELL replied: "The damages might be proved by evidence under this declaration." And CROMPTON, J., said: "Section 1 appears to contemplate giving damages whenever

the party injured could have recovered them, whether nominal or more;" and the point was overruled. It may be that this ruling is to some extent weakened by the language of BARON POLLOCK in the subsequent case of Duckworth *v.* Johnson, 4 Hurl. & N. 653, where he says: "If there were no damages the action is not maintainable. It appears to me that it was intended by the act to give compensation for damages sustained, and not to enable persons to sue in respect to some imaginary damages, and so punish those who are guilty of negligence by making them pay costs." But this language is not necessarily at variance with the decision in Chapman *v.* Rothwell, and ought not to be held to establish a different rule of pleading. It would therefore seem that in England there need be no special allegations showing damages.

In an early case under the New York statute (Safford *v.* Drew, 3 Duer, 627), JUSTICE DEWER held that it was necessary, under the statute, to show the existence of parties who were entitled to the benefit of the action, and that such parties had suffered pecuniary loss, and said: "These facts are in their nature material and issuable, and in actions like the present one are, therefore, in my judgment, just as necessary to be proved upon the trial, and, consequently, to be averred in the complaint, as the death of the person injured, and the wrongful act or neglect of defendant as the primary cause." If the able justice intended to say that the complaint must contain specific allegations as to the character of, and reasons for, the damage, then, as we shall see, the case has not been followed in New York. But in Regan *v.* Railway Co., 51 Wis. 599, 8 N. W. 292, it was held that the complaint should allege facts showing that a present or prospective pecuniary loss or injury had resulted to the relatives in whose behalf the action was brought, and cited the case in 3 Duer in support of the position. The same rule of pleading under this statute has been adopted in Michigan. Hurst *v.* Railway Co., 84 Mich. 539, 48 N. W. 44. It should be noted in this case, however, that the action was brought to recover damages caused by the death of an infant less than two years of age. A general allegation of damage was held bad in Charlebois *v.* Railroad Co., 91 Mich. 59, 51 N. W. 812, where the action was to recover damages for the death of an infant eight years of age. In Texas, also, it is held that the doctrine of nominal damages does not apply. McGown *v.* Railway Co., 85 Tex. 289, 20 S. W. 80. In that case it was sought to recover damages for the death of a wife. We do not understand the supreme

court of Texas to hold that a general allegation of damages is insufficient as a matter of pleading. But it does hold that actual damages must be shown. It is perhaps proper, while the cases are not clear upon the subject, to place Nebraska among the states which require the damages to be specially pleaded. See Electric Co. *v.* Laughlin, 45 Neb. 390, 63 N. W. 941 ; Orgall *v.* Railway Co., 64 N. W. 450. And perhaps, also, South Dakota. Belding *v.* Railway Co., 53 N. W. 750.

On the other hand, very eminent courts have held that a general allegation of damages was sufficient, under these statutes ; that special allegations of damages were not required ; and that nominal damages might be recovered. Railway Co. *v.* Shannon, 43 Ill. 338 ; Railway Co. *v.* Swett, 45 Ill. 197 ; City of Chicago *v.* Scholten, 75 Ill. 468 ; Gorham *v.* Railway Co., 23 Hun, 449 ; Lehman *v.* City of Brooklyn, 29 Barb. 234 ; Ihl *v.* Railroad Co., 47 N. Y. 317 ; Oldfield *v.* Railway Co., 14 N. Y. 310 ; Railway Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877 ; Johnson *v.* Railroad Co., 7 Ohio St. 337 ; Nagel *v.* Railroad Co., 10 Am. & Eng. R. Cas. 702 ; Serensen *v.* Railroad Co., 45 Fed. 407 ; Kenney *v.* Railroad Co., 49 Hun, 535, 2 N. Y. Supp. 512 ; Atrops *v.* Costello, 8 Wash. 149, 35 Pac. 620 ; Barnum *v.* Railroad Co., 30 Minn. 461, 16 N. W. 364.

In Korrady *v.* Railway Co., 131 Ind. 261, 29 N. W. 1069, CHIEF JUSTICE ELLIOT, speaking for the full bench, said : "The appellee's contention that the complaint is bad because it does not specifically show that actual damages were sustained by the widow and infant children of the appellant's intestate cannot prevail. Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kinsfolk sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children."

These citations are sufficient to show that the decided weight of authority is opposed to the rule requiring a specific allegation of damages in order to constitute a good complaint. It is true that some of the cases go upon the theory that, when the wrongful act of the defendant is once established as

the proximate cause of the death, the statute then bases a cause of action upon such wrong, and will presume nominal damages. But the more general holding is to the effect that, the wrongful act being once established as the cause of death, the decedent being free from fault, the plaintiff may, under a general allegation of damages, recover all such damages, within the amount claimed, as are ordinarily and usually sustained, from the loss of such life, by those standing in the relation to the decedent sustained by those in whose interest the suit is brought. This holding, we think, violates no rule of code pleading. The defendant is always sufficiently advised as to what he must meet on the question of damages. Any facts or circumstances tending to reduce the pecuniary value of the life destroyed may always be shown. The case of Atrops *v.* Costello, *supra*, well illustrates this principle.

There is a distinction noticed in some of the cases that we think is founded upon reason. When the party in whose interest the suit is brought sustained such relations to the deceased that he had the legal right to demand the services of the deceased, or to demand support and maintenance at the hands of the deceased, then substantial pecuniary damages will be presumed; while if recovery is sought by a collateral relative, or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged. This is illustrated in City of Chicago *v.* Scholten, 75 Ill. 468; Coal Co. *v.* Hood, 77 Ill. 68; Winnt *v.* Railway Co., 74 Tex. 32, 11 S. W. 907.

In this case we make our holding no broader than the facts require. The complaint discloses that the deceased left a widow and minor children of tender years. There is a general allegation of damages, but no facts pleaded showing in what such damages consist. The wife and minor children were entitled by law to demand support and maintenance at the hands of the husband and father. When, by the wrongful act of the defendant, they are deprived of that husband and father, the law presumes pecuniary damages, and particular facts showing damages need not be pleaded. Our judgment of reversal must stand. All concur.

WINTERS

v.

COWEN *et al.*

(*Circuit Court, N. D. Ohio, W. D. Oct. 10, 1898.*)

Sale of Ticket by Agent—Liability of Principal.—A railroad company empowered by another railroad company to issue and sell mileage tickets available over the road of the latter, is the agent of the latter; and where such a ticket has been sold by the agent to an innocent purchaser, the principal cannot repudiate such ticket.

Ejection of Passenger—Exemplary Damages—Counsel's Fees.*—The controlling officers of such companies, charged with the entire duty of regulating the passenger traffic, after entering into a contract for interchangeable mileage tickets, putting them upon the market, and selling one of them to plaintiff, illegally and in such a manner as to show a disregard for the rights of the innocent holders of such tickets, repudiated them, thereby causing plaintiff to be unlawfully ejected from defendants' car. *Held*, that it was proper to instruct that the jury might go beyond mere compensatory damages, and allow exemplary damages to the extent of reasonable compensation for necessary expenses of vindication by litigation not strictly falling within the bill of costs, such as reasonable compensation to attorneys.

Same—Implied Malice.—The careless manner in which plaintiff's ticket was repudiated showed implied malice on the part of the defendant carrier, and justified the allowance of exemplary damages; and a verdict for $1000 will not be set aside, although plaintiff was ejected without violence, and in a considerate manner.

ON Motion by defendants for New Trial. *Overruled.*

Motter & McKenzie and *James M. Brown*, for plaintiff.
J. H. Collins, for defendants.

HAMMOND, J. Briefly, the facts are that the defendants and the Cincinnati, Jackson & Mackinaw Company had an interchangeable mileage book arrangement, and, by a ticket agent at Cincinnati, sold one of the books to the plaintiff. It was repudiated by the defendants, and the plaintiff was ejected from their train without violence,

Case Stated.

*See note at end of case.

indignity, or other injury than that resulting from the inconvenience and delay incident to the occasion, as it appears in the proof. The Mackinaw Company had sent for sale in bulk at wholesale something over 600 of these books to the agent in Cincinnati. Instead of selling for cash, as he was expected to do, he trusted the broker, who did not pay, and, failing to recover them, the Mackinaw Company instructed all its conductors to outlaw every book presented within the designated numbers covering the 600 books. It also demanded of the defendants that they should reject, according to a list of the numbers, each of these 600 outlawed books; but the defendants, declining to take this burden, repudiated its contract by refusing to receive any book whatever issued by the Mackinaw Company, and so instructed their conductors. The plaintiff's book was not in the outlawed list, having been purchased before the trouble arose. The correspondence between the general passenger agents of these two companies, who were the officials responsible for this ejection of the plaintiff, shows how recklessly they disregarded the rights of the public holding their interchangeable mileage books, innocently, and without notice of any trouble in the premises. It was an entirely unjustifiable performance on their part to ignore the right of the plaintiff certainly, and others of the public who had bought books unaffected with the alleged infirmity. Even as to the 600 tickets, they were not stolen or embezzled or counterfeited; nor were they in any sense defective on their face or in their issue. By their own neglect the companies had put them on the market without receiving, as they expected, cash for them; and the proposition was to impose this loss on the public, or, at least, to mitigate it by putting all holders to the trouble of an investigation, delay, and expense of attention to the matter of securing a refunding of their money, which comparatively few would incur perhaps. These superior officials did not seem to care for the loss, inconvenience, or injury resulting from the rejection of their tickets to passengers; nor for the human indignation they would feel at being put off a train while holding a good ticket, or else being forced to pay fares unlawfully demanded, with only a suggestion to carry their complaints to a distant headquarters, and show that they had a good claim against the company,—to prove that they were innocent of the offense of buying a ticket which the company had itself placed on the market, but which, through the mismanagement of its own agents, had been sold to brokers on

a credit that had failed. And on the witness stand neither of them seemed to regret the predicament of the plaintiff, or to recognize that he had the least ground of complaint on any score. The purchase money of his ticket was not tendered, even by the pleadings here, or otherwise. My purpose in charging the jury was to restrain their natural sense of the outrage of this transaction, and to confine their verdict within temperate limits. It is rather larger than I would have given if on the jury, or if the case had been tried without a jury, for the reason that the conductor's treatment of the plaintiff was so very gentlemanly, and he discharged the disagreeable duty imposed by his superiors with so much regard for the plaintiff's situation that there is no just cause for complaint of his conduct on that occasion.

There was an incident occurring at the trial which possibly inflamed the jury somewhat, though everything was done by the court to prevent that mishap, it being quite apparent that the defendants here sued were not responsible for it, nor their counsel. Shindler, the Mackinaw Company's passenger agent at that time, and who was largely, if not entirely, responsible for the reckless disregard of the rights of the plaintiff in the premises, by assuming, as he did, that he might reject perfectly good tickets sold to unsuspecting purchasers, and forcing the defendants, by his unreasonable demands, to assume that they might lawfully reject all tickets, good or bad, because it was burdensome to them to distinguish good from bad, was called as a witness for the plaintiff. He demanded of the plaintiff in open court, before the jury, that his fees and mileage should be paid before he would testify; and, this being ruled in his favor, they were paid. When it was developed in the testimony that he was largely responsible for the trouble, there was an evident dissatisfaction at his ill-natured demand for his fees in advance; but the court, by admonition and restraint of counsel, protected the defendants against any undue influence of the incident. So, take it altogether, there is no reason for setting aside the verdict for $1,000, because it is too large.

The main ground urged for a new trial is the contention that the defendants were not perpetually bound by their contract for interchangeable mileage tickets, and might revoke it, leaving the purchasers from the Mackinaw Company to look to them to refund the purchase money. The answer to this is that the plaintiff purchased his book before this trouble arose, and it was already a contract with defendants.

But, beyond this, these tickets were *pro hac* the defendants' own tickets, and the issuing company's agents were its own agents for their sale. They should have been withdrawn from use with due regard to the rights of holders, or from the hands of agents, and not exposed to sale; for surely the traveler who goes to an authorized agent having the tickets on hand, and offering them for sale, cannot be required to investigate the traffic contracts to see if they do in fact authorize their sale. Once they are authorized and put upon the market, an innocent purchaser, without knowledge of the revocations of authority, would be protected in their purchase, by enforcing the contract of carriage in his favor. This is the familiar law of agency and the law of sale of such paper as railroad tickets. Railroad Co. *v.* Winter,143 U. S. 60, 69, 12 Sup. Ct. 356.

Sale of Ticket by Agent Liability of Principal.

The concern I have had about the instructions to the jury relate to the matter of exemplary damages. The distinction taken between punitive and exemplary damages may not be technically correct, but it was designed to eliminate fron the minds of the jurors any disposition to punish the defendants and yet to permit them to enlarge their verdict, if they saw fit, by allowing exemplary damages to the extent of reasonable compensation for necessary expenses of vindication by litigation not strictly falling within the bill of costs, such as a reasonable compensation to attorneys. The jury was told that:

Ejection of Passenger Exemplary Damages Counsel's Fees.

"The plaintiff has a right to recover whatever reasonable and temperate sum of money will compensate him for his actual losses as they appear in the proof, to which you may rightly add such sum as, in your judgment, will protect the public against wrongful acts of like character by common carriers,—by way of example, not by way of punishment, for I wish to insist upon a distinction between the two, whether it be a technical distinction or not. It is a practical distinction, which we should bear in mind so as not to be misled by the bare use of words. Every common carrier owes the public a duty in this respect, somewhat different from other parties to a contract; and it is for the vindication of that public duty that the law permits jurors to go beyond mere compensatory damages, and allow exemplary damages, where there has been nothing but erroneous judgment, and yet a reckless disregard of the duty of a public carrier to comply

with its contract of carriage and recognize the tickets it issues which are binding upon it and sometimes the law permits jurors, where there has been actual insult and personal injury, degradation, and humiliation, to add smart money or punitive damages.''

There was an application of this to the facts of the case, and it was further explained that, in this principle of giving exemplary damages, reasonable allowance might be made by the jury, if they thought the case was one for exemplary damages, for incidental expenses and attorney's fees that could not be recovered if there were only a case for compensatory damages and nothing more. It might not be lawful to take proof of the lawyer's fees and expenses to be allowed as such, by way of compensation; but, if the jury determined to give exemplary damages on the facts, they could consider that the plaintiff had been at such expense necessarily, and fix the amount so as to cover such fair and reasonable estimate as they might make. This is the substance of the instructions, and, on the authority of the Ohio cases, I am disposed to adhere to them as correct. Roberts *v.* Mason, 10 Ohio St. 278; Railroad Co. *v.* Ensign, 10 Ohio Cir. Ct. R. 21; Railway Co. *v.* Ensign, 56 Ohio St. 760, 49 N. E. 1115. That was a strong case for punitive damages, in an action for assault and battery; but, if the case be one for only exemplary damages,—if there be a distinction,—I am not able to see why the same principle does not apply. Modern cases have somewhat mitigated the law against carriers in this matter of exemplary damages, by excluding from its allowance those cases where the agent of the carrier was acting outside the scope of his duty, and the malice, express or implied, was that of the agent, and not the principal. Or, to state it otherwise, that breach of public duty, which is so flagrant in its character that it demonstrates that there has been a reckless disregard of the right of the public in the particular case of the passenger who is wrongfully ejected, must be, in the given case, a breach by the carrier company itself, in the sense that the wrongful act constituting the breach was an authorized act, and not the mere individual act of the agent, done beyond the scope of his authority. Such a reckless disregard is implied malice, or is the equivalent of malice, in a technical or legal sense, for which the law allows exemplary damages, as well as for actual malice or ill will; but it must be in its implication attributable to the carrier, and not

to the particular employee on his individual account, unless it may be that the recklessness is founded in the act of the carrier in selecting an incompetent employee or agent; and, where there is no blame in the selection of the agent, the test is that of his authority,—the scope of his authority.

In my judgment, this case falls rather within the category of the case of Railroad Co. *v.* Harris, 122 U. S. 597, 609, 7 Sup. Ct. 1286, than that of Railway Co. *v.* Prentice, 147 U. S. 101, 110, *et seq.*, 13 Sup. Ct. 261. It is true, there was no physical violence in this case, and the recovery of exemplary damages here in no sense depends upon the treatment of the plaintiff by the conductor, and it is not at all like the last-cited case. Nor was there any such flagrant criminality as was found in the other case just cited, by the "controlling officers," to use the language of the opinion, who wantonly disturbed the peace of the community. But this is only a difference in degree. The disregard of the plaintiff's right was, in the nature of that right and its relation to this subject of exemplary damages, just as flagrantly wrongful in the one case as the other, and the principle of making an example for the benefit of others is equally applicable. It is not the character or extent of the injury that invokes the principle, and these cited cases all say that the exemplary damages are not given in behalf of the plaintiff, nor to soothe his injuries, but in behalf of the public, which has been wronged, the public right being vindicated through the plaintiff. This principle is especially applicable to common carriers, and to enforce the rights of those who must resort to them for that service. Therefore, we do not, as in the cases of trespassers upon persons or property producing physical injuries by violence, rely altogether upon that character of injury to determine the right of the public, through the jury, to impose exemplary damages. Those considerations may enter into the amount of the damages, but the right to inflict them depends upon the purpose to compel attention to a public duty. MR. JUSTICE GRAY, in the Prentice Case, *supra*, cites and approves a case from Rhode Island where, on the facts of that case, exemplary damages were refused; but the approved principle of law quoted from that case fully covers this, and justifies the instructions given to the jury. Hagan *v.* Railroad Co., 3 R. I. 88. The use of the word "criminality" in these opinions must not be misunderstood as meaning offenses under the criminal law, but only such indifference of others' rights as amounts to criminal or censurable negligence.

Same Implied Malice.

After referring to cases of aggravated misconduct or lawless acts, and saying that, "the discretion of the jury in such cases is not controlled by any very definite rules," MR. JUSTICE FIELD, in Railroad Co. *v.* Humes, 115 U. S. 512, 519, 6 Sup. Ct. 110, 113, uses this language: "For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment."

See, also, Scott *v.* Donald, 165 U. S. 58, 86–89, 17 Sup. Ct. 266; Milwaukee *v.* Arms, 91 U. S. 489, 495, where MR. JUSTICE DAVIS states the rule thus:

"To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

Ill will is not necessary to constitute malice in law. It is enough if the act be wrongful, done intentionally, without just cause or excuse. Bromage *v.* Prosser, 4 Barn. & C. 247, 255.

In this case the "controlling officers" of the two companies, charged with the entire duty of regulating the passenger traffic and the management of this business between themselves and the public, after entering into a contract for interchangeable mileage tickets, putting them upon the market, and selling one of them to the plaintiff, without the least justification in fact or law, repudiated their contract with him; and this, under circumstances showing the most entire want of care in the premises. This, certainly, does raise a conclusive presumption of a conscious indifference to consequences. They consulted no counsel in a grave matter of legal liability, and, upon their own assumptions of law, acted recklessly and wholly in disregard of the rights of all ticket holders similarly situated as the plaintiff was. Without manifesting the least regret for the injury to the plaintiff, they showed on the witness stand a confidence in their own knowledge of the legal liability and duty imposed by the circumstances under which they acted, that demonstrated the conceit of their own infallibility. It well accounts for their selfish attention to their own profit, convenience, and comfort in the matter of dealing with the tickets they had put out and wished to recall, and at the same time their reckless and wanton inattention and care for the rights of the public. Motion overruled.

NOTE

Recovery of Counsel's Fees as Exemplary Damages Where Injuries Are Wanton or Malicious.—Where an injury is wanton or malicious there may be a recovery of counsel's fees as exemplary damages, in addition to the ordinary court costs awarded the prevailing party.

England.—Sandback *v.* Thomas, 1 Stark. 306, 2 E. C. L. 121.

Alabama.—Marshall *v.* Betner, 17 Ala. 832.

Arkansas.—Levender *v.* Hudgens, 32 Ark. 763.

California.—See Estin *v.* Stockton Bank, 66 Cal. 123.

Connecticut.—St. Peter's Church *v.* Beach, 26 Conn. 355; Noyes *v.* Ward, 19 Conn. 250; Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79; Welch *v.* Durand, 36 Conn. 182, 4 Am. Rep. 55; Mason *v.* Hawes, 52 Conn. 12, 52 Am. Rep. 552; Ives *v.* Carter, 24 Conn. 392.

Georgia.—*Compare* Shaw *v.* Macon, 19 Ga. 468.

Illinois.—Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Krug *v.* Ward, 77 Ill. 603.

Indiana.—Ziegler *v.* Powell, 54 Ind. 173.

Kansas.—Winstead *v.* Hulme, 32 Kan. 568. And see Atchison, etc., R. Co. *v.* Stewart, 55 Kan. 667. *Compare* Dow *v.* Julien, 32 Kan. 576.

Minnesota.—Mitchell *v.* Davies, 51 Minn. 168. And see Seeman *v.* Feeney, 19 Minn. 79.

Mississippi.—New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242.

Missouri.—Gregory *v.* Chambers, 78 Mo. 294.

Nebraska.—Minneapolis Threshing-Mach. Co. *v.* Regier, 51 Neb. 402.

New York.—Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; Williams *v.* Garrett, 12 How. Pr. (N. Y. Supreme Ct.) 456.

Ohio.—Roberts *v.* Mason, 10 Ohio St. 277. And see Finney *v.* Smith, 31 Ohio St. 529, 27 Am. Rep. 524.

Texas.—Landa *v.* Obert, 45 Tex. 539.

Vermont.—Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316.

Virginia.—Parsons *v.* Harper, 16 Gratt. (Va.) 64; Burruss *v.* Hines, 94 Va. 413.

Wisconsin.—Magmer *v.* Renk, 65 Wis. 364; Bonesteel *v.* Bonesteel, 30 Wis. 511.

LOUISVILLE & N. R. Co.

v.

SPINKS.

(*Supreme Court of Georgia, June 8, 1898.*)

Master and Servant—Breach of Contract of Carriage—Ex-Contractu.—A breach by a railroad company of an executory contract, into which it was under no legal duty of entering, to furnish the other contracting party with transportation from one point to another, is not a tort, and does not give rise to an action *ex delicto*.

Elements of Damage.*—The damages recoverable for the violation of such a contract are to be arrived at by taking into account the value of the injured person's lost time, the cost of transportation between the two places, and any other loss or expense legitimately flowing from the failure of the company to comply with its undertaking.

Same.—Physical discomfort, pain, weariness, and injuries to limb or foot occasioned by walking over the distance between the places above indicated are not proper elements of damage in such a case.

Instructions.—On the trial of an action for the breach of such a contract, it was erroneous to give in charge to the jury the rules of law relating to actions *ex delicto*, and especially to read to them the first sentence of section 3907 of the Civil Code, concerning the measure of damages in certain cases of tort.

(Syllabus by the Court.)

ERROR by defendant from Atlanta city court. *Reversed.*

Van Epps & Leftwich, for plaintiff in error.
J. T. Pendleton, for defendant in error.

LUMPKIN, P. J. The plaintiff's petition alleged: The defendant made a contract with petitioner to work for it in its yards in the city of Cincinnati, Ohio. "Under the terms of said contract, defendant was to furnish petitioner transportation to the city of Cincinnati, and to pay all of his expenses going to said city and while remain-

Case Stated.

*See notes at end of case.

ing in said city, until [the defendant] gave him work; and, if he was not willing to work after getting to Cincinnati, defendant was to furnish him transportation back to the city of Atlanta, Ga., and pay him for all the time in going and returning." In pursuance of this contract, he was conveyed to Cincinnati at the defendant's expense, and lodged in an hotel, but, on account of temporary illness, was denied employment, and forced to leave the hotel. He then demanded of the defendant a ticket which would bring him back to Atlanta, and the same was refused. Being without money, he was forced to walk back to his home, in Atlanta, a distance of several hundred miles, and in so doing suffered much from pain, weariness, and blistered feet.

On the trial the plaintiff introduced witness evidence tending to support the allegations of his petition, and obtained a verdict for $370. The case was tried as an action *ex delicto*. The court permitted the plaintiff to prove as elements of damage the pain and weariness he suffered during his journey on foot between Cincinnati and Atlanta, and, in this connection, the fact that his feet, because of this walk, were blistered and made sore. Certain charges were given to the jury by which they were, in effect, instructed that, if the defendant wrongfully refused to give the plaintiff employment, and in violation of its contract declined to furnish him with transportation from Cincinnati to Atlanta, the injuries above mentioned might be considered in arriving at the amount of damages to which he was entitled. The court also read to the jury the first sentence of section 3907 of the Civil Code, which is as follows: "In some torts, the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

Even if the defendant violated its agreement with the plaintiff, and he therefore became entitled to recover for a breach of the contract, the verdict now under review cannot stand, because the case was tried upon a totally erroneous theory. It was, in our opinion, a plain action *ex contractu*, and the law relating to actions *ex delicto* had no application to it whatever. It is exceedingly difficult, especially in view of the numerous decisions of courts holding that divers wrongs more or less connected with breaches of contracts are torts, to give an accurate and satisfactory definition of the word "tort." After pointing out many of the difficulties in the way of so

Master and Servant. Breach of Contract of Carriage. Ex Contractu.

doing, in the course of which it is said that "a tort is an act or omission, giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract," POLLOCK lays down the following somewhat elaborate definition of the meaning of this term: " 'Tort' is an act or omission (not being merely the breach of a duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways: (a) It may be an act which, without lawful jurisdiction or excuse, is intended by the agent to cause harm, and does cause the harm complained of. (b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting. (c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented. (d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely, or within limits, to avoid or prevent." Webb. Pol. Torts, 4, 20. MR. BISHOP, in his work on Noncontract Law (section 4), says: "The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties." This definition is adopted in 26 Am. & Eng. Enc. Law, 72: "The word 'torts' is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may, in general, be classed under the three heads of 'contracts,' 'torts,' and 'crimes.' 'Contracts' include agreements and the injuries resulting from their breach, 'torts' include injuries to individuals, and 'crimes' injuries to the public or state." 2 Bouv. Law Dict. 736, 737, citing 1 Hil. Torts, 1. In a footnote on page 6, 1 Jag. Torts, the author says: "A very simple, but in many respects admirable, definition suggested is: 'A tort is a breach of duty fixed by municipal law,for which a suit for damages may be maintained.' " And it is further remarked "that the duties for the violation of which an action in tort can be maintained against a common carrier or a master are really fixed by municipal law, although they may be also incorporated in a contract."

Section 3807 of our Civil Code reads as follows: " A tort is a legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual." Section 3810, which is a portion of the chapter on torts, declares that "private duties may arise either from statute, or flow from relations created by contract express or implied. The violation of any such specific duty, accompanied with damage, gives a right of action." In arriving at a correct understanding of the meaning of section 3807, the words "independent of contract" must be understood as applying to each one of the three subdivisions embraced in that section. Accordingly, the third subdivision means the same as if it read: "The violation of some private obligation, independent of contract, by which like damage accues to the individual;" and section 3810, in so far as it refers to private duties flowing from "relations created by contract, express or implied," means the same thing.

Every person who makes a contract of any kind is, of course, under a duty of performing it; but it would never do to hold that every breach of a civil contract, though necessarily in a sense involving a breach of the duty thereby imposed, would give rise to an action *ex delicto*. JUDGE COOLEY says that, at common law, "breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically 'wrongs' or 'torts,' and the actions by which redress was to be obtained were called 'actions for 'torts' or 'actions *ex delicto*.'" Cooley, Torts (2d Ed.) 2, 3. This distinguished author, on pages 103 and 104 of the same work, says: "Passing, now, from a consideration of torts as they are found to be akin to or coincident with public wrongs, we may briefly direct attention to another side, on which they seem to be mere breaches of contract. Indeed, in many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty." He then proceeds, on

pages 105 and 106, to give illustrations where action *ex delicto* may arise from a breach of private duty originating in contract. Among these, he declares that "the case of the common carrier furnishes us with a conspicuous illustration," and also refers to the duties resting upon bailees and innkeepers, concluding with the remark: "The rule is general that, where contract relation exists, the parties assume towards each other no duties whatever besides those the contract imposes."

Our own Reports afford numerous instances where one who has sustained damages may bring an action upon the contract broken, or declare in tort for the defendant's violation of a duty imposed upon by law. See Railroad Co. *v.* Bigelow, 68 Ga. 219; Railway Co. *v.* Brauss, 70 Ga. 368; Railroad Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061; Caldwell *v.* Railroad Co., 89 Ga. 550, 15 S. E. 678; Railroad Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352. These were all actions against railroad companies, in each of which the defendant, in violating the contract rights of the plaintiff, was also guilty of a breach of its public duty as a common carrier. The case of Lea *v.* Harris, 88 Ga. 236, 14 S. E. 566, furnishes an illustration of the violation of a private obligation or specific duty arising out of a contract, and accompanied by damage which gave to the plaintiff a right of action *ex delicto*. Lea sold Harris the timber on certain land, and contracted to allow him until a day named in the future within which to cut, haul, and remove the timber from the land, but in disregard of this contract prevented Harris from cutting and removing the timber, and forced him to give up the contract. Harris' right to cut the timber arose under a contract, but Lea's unlawful interference with the exercise of that right was, under the circumstances, held to be a tort.

We are unwilling to strain sections 3807 and 3810 of our Code, beyond what we regard as their true intent and meaning, by holding that a breach of an executory contract, into which a railroad company was under no legal duty of entering, can be made the basis of an action *ex delicto*; nor have we been able to find any decision of this court which, fairly construed, would constrain us to go to such an extent. If a contract for passage has been actually made and violated,—as, for instance, by expelling a passenger from a train,—clearly the injured party may sue in tort. Or if a person applied to the proper agent of a railroad company for a ticket, tendered the requisite price, and the ticket was refused, this would be a violation of the carrier's public duty which would entitle

such person to bring an action *ex delicto*. It would be easy to multiply illustrations of this kind, but the present case is altogether different. The plaintiff was not, in any sense, a passenger, either of the defendant company or of any railroad company having a line forming a part of a railroad route between the cities of Cincinnati and Atlanta. It does not affirmatively appear that the defendant company's line constituted a portion of any such route of travel. There was simply an executory agreement between the plaintiff and the defendant whereby the latter, upon condition that the former did certain things, was to furnish him transportation from one city to another. Assuming that the plaintiff performed his part of the agreement, the defendant's refusal to comply with its obligations thereunder was like any other breach of an ordinary contract involving no violation of a public duty or of a private duty resulting in any invasion of a vested right of the plaintiff in the premises. If the railroad company had owed him wages for work already done, a failure to pay the same would, of course, in a certain sense, be the breach of its duty to him, but, at the same time, such failure would not constitute a tort. The breach of the contract now under consideration is of a similar nature, and stands upon precisely the same legal footing. We are unable to see that the case has a single element of tort. It follows, of course, that, if the plaintiff voluntarily took upon himself the burden of walking over the several hundred miles lying between Cincinnati and Atlanta, he cannot, in law, compel the defendant to compensate him for his pain and weariness or for the blisters on his feet. The measure of the damages which should be allowed in such a case is that indicated in the second headnote. Judgment reversed. All the justices concurring.

Elements of Damage.

NOTES.

Carriers of Passengers—Failure to Carry—Elements of Damages.—The damages for a mere failure or refusal of a carrier to carry a passenger will, in general, consist in compensation for the actual loss sustained by the passenger. This may include, speaking generally, the following; the expense of reaching his destination by another means, hotel expenses incurred by the delay, and any actual loss sustained in matters of business as the direct and necessary consequence of the carrier's failure to carry him. Cranston *v.*

Notes

Marshall, 5 Exch. 395; Hamlin *v.* Great Northern R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20; Morse *v.* Duncan, 14 Fed. Rep. 396, The Zenobia, Abb. Adm. 80; Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135; Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 35 Am. St. Rep. 422, 52 Am. & Eng. R. Cas. 176; Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7; Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

In Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135, and Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 35 Am. St. Rep. 422, 52 Am. & Eng. R. Cas. 176, the failure to carry was occasioned by the refusal of the carrier's gate-keeper to admit the passenger to the train, and the elements of damages to be recovered were held to be such as are stated in the above rule.

So, where the agent of a railroad company in Atlanta, Ga., sold to a passenger a ticket to Galveston, Tex. (to which point it was guaranteed he could go), by way of his own road and connecting roads to New Orleans, and thence by the Morgan line of steamers to Galveston, and upon the arrival of the passenger train in New Orleans he found that the steamers on the Morgan line had been taken off, it was held that if there were other routes to his destination open to him, the measure of damages which he could recover against the road issuing the ticket would be what it would have cost him to have reached his destination by other means and routes than the Morgan line, including reasonable pay for delays; and it might include, also, such special damages as the party may have sustained by reason of such delay. If the steamers had been withdrawn when the ticket was purchased, and the purchaser proceeded to New Orleans, and there was no other convenient and expeditious way, then the measure of damages would be the expenses of the purchaser from Atlanta to New Orleans and back, expenses while there, necessary expenses on the road, and the loss of time making the passage there and back. Central R. Co. *v.* Combs, 70 Ga. 533, 18 Am. & Eng. R. Cas. 298. And see Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26; Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7.

Same—Same—Same—Sickness.—Sickness brought about by the failure to carry may also become an element of damages where it results proximately from the carrier's negligence and not from that of the passenger. See Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Heirn *v.* M'Caughan, 32 Miss. 17, 66 Am. Dec. 588.

But sickness is not an element when caused by the passenger's negligence or imprudence. Morse *v.* Duncan, 14 Fed. Rep. 396; Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Francis *v.* St. Louis Transfer Co., 5 Mo. App. 7.

Inconvenience is an element when capable of being stated in a tangible form and assessed at a money value. Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135; Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 35 Am. St. Rep. 422, 52 Am. & Eng. R. Cas. 176; St. Louis, etc., R. Co. *v.* Berry, 4 Tex. App. Civ. Cas., § 166.

Where a passenger contracted for carriage by a certain steamer, which turned out to have been wrecked before the contract was made, it was held, in an action on the contract, that the passenger could recover back money paid for passage on the steamer, but not for the disappointment in not reaching his destination. Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

But see St. Louis, etc., R. Co. *v.* Berry, 4 Tex. App. Civ. Cas., § 166, where the appellee while traveling with his family, was delayed several days by reason of the appellant's negligence, and it was held that he could recover for the annoyance, vexation, and trouble occasioned by the delay. And in Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376, 15 Am. Ry. Rep. 71, where the action was on a special contract to carry on Sunday, there is a dictum to the effect that the plaintiff could have recovered from the disappointment of mind, sense of wrong, or injured feelings caused by the failure of the defendant to completely perform its contract, if the action had been for a breach of the carrier's general duty.

LEZINSKY

v.

METROPOLITAN ST. RY. CO.

(*Circuit Court of Appeals, Second Circuit, June 24, 1898.*)

Prosecution of Passengers—Authority of Conductors.*—It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thereby to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor.

Same—Ratification.—The fact that a clerk in defendant's claim office, who was sent by his superior officers to the station house "to

*See notes at end of case.

see what the matter was", plaintiff having also procured the arrest of the conductor, acted as prosecuting attorney against plaintiff, did not tend to show ratification of the conductor's conduct on the part of the company.

ERROR by plaintiff to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

Samuel S. Slater, for plaintiff in error.
Charles F. Brown, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is a writ of error to review a judgment in the circuit court for the Southern district of New York for the defendant, upon a verdict which was directed by the court upon the defendant's motion at the close of the plaintiff's case. The action was against the Metropolitan Street-Railway Company for malicious prosecution and for false imprisonment. The facts were as follows: The plaintiff, on April 3, 1896, at 12:30 p. m., entered at Spring street, in New York City, a car of the defendant, which was going uptown, and paid his fare. The car stopped, on account of a blockade, before it reached Houston street, when the conductor told the passengers that if they were in haste, they had better walk to Houston street, where cars were being switched back, and take an uptown car, that he had no transfers, but "that it would be all right" if the passengers would explain to the inspector who was in charge of switching the cars. The plaintiff walked to Houston street, but a car had just left. The inspector told him to explain to the conductor of the next northward car the circumstances in regard to the payment of fare, and that a new payment would not be required. The plaintiff, with other passengers from the original car, boarded a car at Bleecker street, a block above Houston street; but its conductor demanded fare from all the passengers, would not recognize the previous payment, stopped the car at Ninth street, and ordered the passengers to pay the fare or to leave the car. The plaintiff refused to obey either direction, was ejected, and thereupon the conductor charged him with disorderly conduct, and requested a policeman to arrest him. He was put under arrest, and made a countercharge against the conductor, who was also arrested, and both were taken to the station house, detained 2½ hours, when the plaintiff was tried and discharged. Upon the way to the station house, the party

Case Stated.

met the conductor of the first car, who explained the facts to the second conductor, but he persisted in making the charge. At the station house, one Isaacson, a clerk in the defendant's claim department, who was sent there by some one of the defendant's officers to find out what the matter was, endeavored to persuade the plaintiff to withdraw his charge, saying that the conductor would also withdraw; but the plaintiff refused, and the case was heard, Isaacson arguing before the magistrate in support of the charge against the plaintiff.

The complaint was not brought to recover damages for the defendant's unlawful ejection of the plaintiff from the car, but to recover for a malicious prosecution and false imprisonment by the defendant's agent, after the plaintiff left the car. The defendant's liability depends upon the answer to the questions: First. Was the conductor acting in the course of his employment and within the scope of his authority, express or implied, in causing the arrest of the plaintiff, after he left the car, for his prior disobedience? And, secondly, if the conductor acted without authority, was there any testimony from which a jury could properly infer a ratification by the defendant of the conductor's act in causing the arrest?

Prosecution of Passengers. Authority of Conductors.

The defendant is a common carrier, and it was its duty, upon the payment of fare, to exercise due care in the safe carriage of the defendant to the point upon the line of the road where he wished to go; and for his improper removal from the car it would have been liable in damages, because the carrier's obligation to transport safely "includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the act of transportation." Steamship Co. *v.* Kane, (decided at the present term of this court) 88 Fed. 197. The subsequent act of the conductor in causing the arrest of the passenger was apparently outside of the course of his employment, outside of his service as a conductor, and was his act as an individual. It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor. A criminal charge, under the circumstances of this case, was baseless (Lynch *v.* Railway Co., 90 N. Y. 77); and while it is established that "a corporation

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is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be no written appointment or authority (Railway *v.* Harris, 122 U. S. 597, 7 Sup. Ct. 1286; State *v.* Morris & E. R. Co., 23 N. J.Law, 369; Rounds *v.* Railroad Co., 64 N. Y. 129; Mott *v.* Ice Co., 73 N. Y. 543), yet there should be some testimony or some circumstance to show that authority had been conferred for such a manifest apparent departure from the line of the business of a conductor of a street electric car.

It was sought to show ratification of the act by the attendance and conduct of one Isaacson at the hearing before the magistrate, and by the scope of Isaacson's employment. He was a clerk in the defendant's claim department, which had charge of the preparation of accident cases for trial, and was sent by his superior officers to go to the police court, "and see what the matter was." Inasmuch as a conductor had left his car, and been taken to the station house in charge of an officer, the direction was a very natural one to give. Isaacson went, and after ineffectually trying to induce the plaintiff to abandon his charge, and have a dismissal of both cases, he endeavored to show the magistrate that the conductor was in the right, and in so doing, imitated the conductor in departing from his employment, without authority and with intrusive meddlesomeness. There would have been no propriety in submitting to the jury the question of ratification, based upon Isaacson's act or authority or course of business. The judgment of the circuit court is affirmed, with costs.

NOTES

Malicious Prosecution—Liability of Corporations.—In some of the earlier cases it has been held that a corporation was not liable for a malicious prosecution instituted by its agents on the ground that such prosecution must necessarily have been *ultra vires*. Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560. (Overruled in Jordan *v.* Alabama, etc , R. Co., 74 Ala. 85) ; Childs *v.* Bank of Missouri, 17 Mo. 213. (Overruled in Woodward *v.* St. Louis. etc., R. Co., 85 Mo. 142) ; Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48; Stevens *v.* Midland, etc., R. Co., 10 Exch. 352. See also McLellan *v.* Cumberland Bk., 24 Me. 566.

Same.—*The modern doctrine*, however, is well settled that corpo-

rations are liable for this, as well as for other torts, where the malicious prosecution is instituted in the course of the agent's official duty. Hussey *v.* Norfolk So. R. Co., 98 N. Car. 34; s. c., 2 Am. St. Rep. 312 and *note*; Vance *v.* Erie R. Co., 32 N. J. L. 334, s. c., 90 Am. Dec. 665; Fenton *v.* Wilson S. M. Co., 9 Phila. (Pa.) 189; Reed *v.* Home Savings Bank, 130 Mass. 443; Morton *v.* Metropolitan Ins. Co., 34 Hun (N. Y.) 366; *affirmed* 103 N. Y. 645; Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469; s. c., 25 Am. Rep. 783; Boogher *v.* Life Assn., 75 Mo. 319; Woodward *v.* St. Louis, etc., R. Co., 85 Mo. 142; Copley *v.* G. & B. Sewing Machine Co., 2 Woods (U. S.) 494; Ricord *v.* Central Pac. R. Co., 15 Nev. 167; Williams *v.* Planter's Ins. Co., 57 Miss. 759; s. c., 34 Am. Rep. 494; Carter *v.* Howe Machine Co., 51 Md. 290; s. c., 34 Am. Rep. 311; National Bank *v.* Graham, 100 U. S. 699; Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505; Edwards *v.* Midland R. Co., 2 B. Div. 43, 6 Q. B. Div. 287; Goodspeed *v.* East Haddam Bank, 22 Conn. 530, (decided by an evenly divided court); Denver, etc., R. Co. *v.* Harris, 122 U. S. 596; Jordan *v.* Alabama, &c., R. Co., 74 Ala. 85; s. c., 49 Am. Rep. 800; overruling Owsley *v.* Montgomery, &c., R. Co., 37 Ala. 560; American Express Co. *v.* Patterson, 73 Ind. 430; Pennsylvania Co. *v.* Weddle, 100 Ind. 18; Wheeler, &c., Co. *v.* Boyce, 36 Kan. 350, s. c., 59 Am. Rep. 571; Walker *v.* Southeastern R. Co., L. R. 5 C. P. 640.

The leading case sustaining this view is that of Goodspeed *v.* East Haddam Bank, 22 Conn. 530, which, although decided by an evenly divided court, seems to have turned the tide in its direction. The argument of CHURCH, C. J., is as follows: "These institutions (corporations) have so multiplied and extended within a few years that they are connected with, and, in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this, but we say that, as new relations from this cause are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied. The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically and consistently with their respective charters; and no good reason is discovered why this should not be so, or why it cannot be done in a case like this without violating any sensible or useful principle. But, after all, the objections to the remedy of this plaintiff against the bank in its corporate capacity is not so much that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that spe-

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cies of torts which essentially consist in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore cannot commence or prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives and act from motives, is to deny the evidence of our senses when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive they can have a bad one; they can intend to do evil as well as good. If the act done is a corporate one, so must the motive and intention be.. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted and subsequently sanctioned by the bank in the usual modes of its action, and still to claim that although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application."

Joinder.—And the corporation and its servant by whose act the injury was done may be joined in the action. Hussey *v.* Norfolk S. R. Co., 98 N. Car. 34; Gulf, etc., R. Co., *v.* James (Tex.) 10 S. W. Rep. 744.

Same—Test of Liability.—"The test of liability is whether the agent acted within the general scope of his powers about the corporate business or in furtherance of its real or supposed interest." 5 Thompson on Corporations, § 6312, citing Gillett *v.* Missouri, etc., R. Co., 55 Mo. 315, 316; Goodspeed *v.* East Haddam Bank, 22 Conn. 530. Thus in Pinkerton *v.* Gilbert, 22 Ill. App. 568, it was held that where it was shown that the prosecution complained of was instituted by defendant's superintendent, who was not authorized to institute or prosecute suits in its behalf, that defendant company was not liable. See, also, Springfield, etc., Co. *v.* Green, 25 Ill. App. 106.

In an action against a foreign corporation for wrongful attachment, there was evidence that defendant's agent made the affidavit by direction of its general manager in the state; that, after he made the affidavit, he visited the town where plaintiff was doing business, and heard that plaintiff had mortgaged some buggies to a bank; that, after reporting to the manager, the latter directed him to attach; and that the attachment was made partly on such rumors, "but mainly on the fact that we believed that" plaintiff "was not coming up to his contract." *Held*, that the evidence supported a finding that the acts complained of were directed by defendant. Emerson Talcott & Co. *v.* Skidmore (Tex. Civ. App.) 25 S. W. 671.

Same.—*In Maryland* the doctrine seems to be that to render a corporation liable for malicious prosecution, the agent instituting the prosecution must have been shown to have had the express authority for his act, or the act must have been ratified by the corporation. Cent. R. Co. *v.* Brewer (Md.), 28 Atl. Rep. 615; Carter *v.* Howe Machine Co., 51 Md. 290.

WILLIAMS

v.

OREGON SHORT-LINE R. CO.

(*Supreme Court of Utah, Nov. 12, 1898.*)

Actions for Personal Injuries—Pleadings.—In tort plaintiff is not required to aver all the physical injuries which he sustained, or which may have resulted from, or be aggravated by, the wrongful act of defendant. If such injuries can be traced to the act complained of, or are such as would naturally follow from it, they need not be specifically alleged, following the rule adopted in Croco *v.* Railroad Co., 54 Pac. 985, 17 Utah,——. Rule not changed by interposition of special demurrer. If special damages are claimed, such damages must be specifically alleged.

Jurors—Statutes.—The provisions of sections 1302, 1306, Rev. St. 1898, fixing the time for the appointment of jury commissioners and the selecting of the list of jurors by such commissioners are directory merely and an objection to the panel on the ground that the commissioners were appointed and made their selections after January 1, 1898, was properly overruled. Kennedy *v.* Railroad Co., 54 Pac. 988, 17 Utah,——, followed.

Riding on Pass—Exemption from Liability—Validity of Stipulation.*—Where there is a valid consideration for a pass given by a railroad company, conditions printed on such pass, exempting the company from responsibility for the negligence of its servants, do not bind the passenger, and should not be admitted in evidence in an action for damages for injuries caused by negligence.

Same.—By the great weight of authority in this country, the general rule as to the right of common carriers to stipulate for exemption from responsibility for negligence is as follows: First. A common carrier cannot stipulate for exemption from responsibility,

*See notes at end of case.

when such exemption is not just and reasonable in the eye of the law. Second. It is not just and reasonable, in the eye of the law, for the common carrier to stipulate for exemption from responsibility for the negligence of the master or his servants. Third. These rules apply both to carriers of goods and carriers of passengers, and with special force to the latter. Fourth. Where a person agrees with a carrier to enter into its employment at a certain place in the future, and in consideration of the mutual interest of both a free pass is given to the place of employment, with conditions on the back rendering the carrier nonliable for injuries caused by its negligence or that of its agents, and in traveling on the defendant's road to the place of employment the person is injured by the negligence of the carrier's agents, such person must be regarded as a passenger for hire, and not an employee, and the carrier is liable for damages caused the passenger for its negligence.

(Syllabus by the Court.)

APPEAL by defendant from Weber county district court. *Affirmed.*

Williams, Van Cott & Sutherland, for appellant.
Richards & Macmillan, for respondent.

MINOR, J. This action was brought to recover damages for personal injuries received by plaintiff while riding as a passenger upon defendant's cars near Malad Bridge, Idaho, on the 3d day of April, 1897. The complaint charged, in substance, that, while plaintiff was riding in defendant's cars as a passenger, the defendant carelessly and negligently operated and ran its train at a great and dangerous rate of speed over and upon a defective and inadequate railway track, roadbed, and switch maintained by it, and by reason of such negligence and carelessness the train was wrecked, and the plaintiff was thereby greatly and permanently injured, crushed, bruised, and wounded in his back and loins, and in various other parts of his body, both externally and internally, and some of his ribs were broken; and because of said injuries plaintiff became sick, sore, lame, and disordered, and so continues to this day; and he has suffered, and now suffers, thereby great mental and physical pain and distress; and by reason of said injuries he has been rendered unable to follow his usual avocation, and was compelled to lay out and expend $50 for medical treatment, etc. To this complaint the defendant interposed a special demurrer to the effect that it was unintelligible, ambiguous, and uncertain,

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and that it did not appear what the nature, extent, or kind of injuries, either external or internal, were inflicted, except that some of his ribs were broken, and that the nature and extent of the injury were not set forth. The demurrer was overruled, and the defendant filed its answer, denying the allegations of the complaint, and alleged that at the time of the injury plaintiff was not a passenger, but was traveling on a free pass or ticket delivered to plaintiff without consideration.

1. Appellant contends that the court erred in overruling the demurrer. We do not agree with the appellant in this contention. In the case of Croco *v.* Railroad Co. (decided at the present term of this court) 54 Pac. 985, 17 Utah,—, this court, in passing upon the same question, said that the plaintiff was not required to aver all the physical injuries which he sustained, or which may have resulted from, or be aggravated by, the wrongful act complained of. If such injuries can be traced to the act complained of, or are such as to naturally follow from the injury, they need not be specifically averred. When the defendant was informed by the complaint that the plaintiff was permanently injured, crushed, bruised, and wounded in his back and loins, and in various other parts of his body, both externally and internally, some of his ribs broken, and because of such injuries plaintiff became sick, sore, lame, and disordered, and so continued to be, and suffered by reason thereof great mental and physical pain and distress, he was bound to expect evidence of any sickness or any injury to plaintiff's body, both mental and physical, the origin or aggravation of which could be traced to the negligent act complained of. A complaint alleging negligence and carelessness should specifically state the acts or omissions complained of with reasonable certainty, and show what such negligence or carelessness consisted of, or it will be held bad on special demurrer. Mangum *v.* Mining Co., 50 Pac. 834, 15 Utah, 534; Railroad Co. *v.* Harwood, 90 Ill. 425. But such particularity is not required in stating the injury complained of. It is sufficient on special demurrer if the facts are stated within the rule heretofore laid down. Where, however, special damages are claimed, such damages must be specifically alleged. In the case of Croco *v.* Railroad Co., above referred to, many cases are cited, and the above rule adopted. The fact that a special demurrer was interposed in this case does not change the rule. The allegations in this complaint were sufficiently unambiguous and certain to give the defendant notice of the na-

Actions for Personal Injuries. Pleadings.

ture and character of the injury complained of. The demurrer was properly overruled.

2. It is also contended that the court erred in denying defendant's challenge to the panel of jurors. The grounds of the challenge were the same as those made in the case of Kennedy *v.* Railroad Co. (decided at the present term of this court), reported in 54 Pac. 988, 17 Utah.—. In that case this court held against the contention of the appellant. The holding in that case is decisive of the question here presented.

Jurors. Statutes.

3. The plaintiff gave testimony tending to show that in April, 1897, he applied to Mr. Boies, defendant's train master at Pocatello, Idaho, for employment. Boies agreed to give him employment as a brakeman if he would go to Glenn's Ferry, Idaho. The plaintiff agreed to go to Glenn's Ferry, and Boies gave him a pass from Pocatello to that place and return. Plaintiff did not ask for the pass. The pass had an indorsement on the back of it. Plaintiff could not say that he read it. It was usual, when a man was employed on a railroad and went to a particular place, to give him a pass to such place. Plaintiff's employment was to begin when he was put to work, and he was to begin work when he arrived at Glenn's Ferry and when placed at work. His time was not going on when the accident occurred. The understanding was that plaintiff's time would begin when he was actually put to work. While traveling on a free pass, in pursuance of the agreement, on defendant's railroad to the place of employment, and when near Malad Bridge, in Idaho, and before reaching Glenn's Ferry, the train was wrecked, and the plaintiff was injured. The signature of the plaintiff on the back of the pass was admitted. The pass was received in evidence. But the following conditions, indorsed on the back of the pass, were offered in evidence, and, on objection, were refused by the court: "This ticket is not transferrable, and is void if presented by any other than the person named, or if any alteration, addition, or erasure is made upon it. The person accepting and using this ticket, in consideration of receiving the same, voluntarily assumes all risks of accidents and damages, and expressly agrees that the Oregon Short-Line Railroad Company shall not be regarded as a common carrier, nor as liable to him for any injury to his person or any loss or damage to his baggage, which may occur while using this ticket, whether caused by the negligence of the company's agents or

otherwise. Not good unless signed in ink by the person named on the pass. J. A. Williams." Among other things, the court instructed the jury as follows: "I charge you that it was the duty of the defendant to use the utmost care and skill which prudent men are ordinarily accustomed to use in keeping its roadbeds, rails, and switch in proper repair, and adequate for the purpose for which they are used; and if you believe from the evidence that such care was not exercised upon the part of the defendant, by reason of which the train upon which the plaintiff was riding became derailed, which caused his injury, then I charge you that you should find a verdict in favor of the plaintiff." The appellant contends that the court erred in refusing to admit in evidence the conditions on the back of the pass, and in giving the jury the above instruction, requiring the greatest care, as in case of a passenger, and claims that the plaintiff was an employee, and not a passenger, and therefore the defendant only owed him the exercise of ordinary care at the time of the injury; and that the instruction is incorrect, except when the relationship of passenger and carrier exists. The testimony shows that the plaintiff had agreed to enter the employment of the defendant as a brakeman at such time as he could reach Glenn's Ferry, Idaho. Free transportation, with the conditions attached thereto, was given the plaintiff by the defendant, without request, for the purpose of enabling the plaintiff to reach the agreed place, where the employment would commence. Plaintiff's compensation was not to commence until he reached Glenn's Ferry, and was there given employment on the order given by the yard master. Therefore the relation of employee and employer—master and servant—had not yet attached at the time of the injury which occurred at Malad Bridge. The intention was to employ and be employed, and the pass was given with that expectation. The transportation of plaintiff to Glenn's Ferry was not a matter of charity or gratuity on the part of the defendant. The free pass was given by virtue of an agreement by which the mutual interests of the parties were considered. The plaintiff desired employment at Glenn's Ferry. The defendant desired plaintiff's services at Glenn's Ferry, and agreed to transport him there free of charge, if he would go there, and enter its employment after he arrived there. The plaintiff agreed to this arrangement. The transaction was a mutual benefit to both

of the parties, and the pass did not alter it. This was a case where the defendant, as a common carrier of passengers, could not stipulate for the exemption from liability on account of the negligence of his servants. The pass was simply the evidence of a right to be transferred over the road, but not of a contract by which the plaintiff was to assume all the risks; and it would not have been valid if it had been. Under these circumstances it was not important what the back of the pass contained. Plaintiff's acceptance of the pass under the circumstances and conditions would not prevent a recovery. There was a valid consideration for the pass, the plaintiff was a passenger, and entitled to that degree of care covered by the instruction. Being such, the defendant had no right to stipulate for the immunity expressed on the back of the pass. Railway Co. *v.* Stevens, 95 U. S. 655; Railroad Co. *v.* Lockwood, 17 Wall. 357; 3 Wood, R. R. p. 1696; 2 Wood, R. R. p. 1203; Doyle *v.* Railroad Co., 166 Mass. 492, 44 N. E. 611; Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106; Railroad Co. *v.* Weir, 5 Cent. Law J. 285; State *v.* Western Md. R. Co., 63 Md. 433; Gillenwater *v.* Railway Co., 5 Ind. 339.

Riding on Pass. Exemption from Liability. Validity of Stipulation.

It is argued that, even if the ticket was a free pass, gratuitously possessed, with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is correct in this contention. It is held to be the general rule in most of the states that, in the case of a person riding on a free pass the carrier is under the same obligations, as to care and vigilance, as he is to a passenger for hire; and as to a passenger to whom a pass is given based upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence, by any notice to that effect printed upon the pass, as such conditions are held to be against public policy, and void. 2 Wood, R. R. p. 1208; 3 Wood, R. R. p. 1696; Rose *v.* Railroad Co., 39 Iowa 246; Railroad Co. *v.* Wynn, 88 Tenn. 330, 14 S. W. 311; Annas *v.* Railroad Co., 67 Wis. 46, 30 N. W. 282; Railroad Co. *v.* Lockwood, *supra*; Railway Co. *v.* McGown, 65 Tex. 640; Shear. & R. Neg. § 492; State *v.* Western Md. R. Co., *supra*; Gillenwater *v.* Railway Co., *supra*; O'Donnell *v.* Railway Co., 50 Pa. St. 490; Hutch. Carr. § 566. In Saunders *v.* Southern Pac. Co., 13 Utah, 284, 49 Pac. 646, this court held, with reference to a drover's pass, where like conditions

Same.

were attached, that the holder of the pass was a passenger, and entitled to protection as a passenger, on such train, regardless of any clause in the contract exempting the carrier from liability for negligence of its servants, because such clause is against the policy of the law, and therefore void; that, when the passenger was received, the company was liable for any injury which might befall him through the negligence of its servants, the same as though he actually paid his fare before entering the cars, and as to him the company was bound to the exercise of the same care. Hutch. Carr. § 550b; Railroad Co. *v.* Lockwood, 17 Wall. 357. Speaking of the duties of common carriers, in Railroad Co. *v.* Lockwood,17 Wall. 357,the court said: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of due care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms. * * * The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out, and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. * * * 'It being clearly established, then' says he, 'that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the ap-

parent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him.' " From a review of the great weight of authority in this country, the general rule with reference to the liability of common carriers is held to be: First, "that a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law"; second, "that it is not just and reasonable, in the eye of the law, for the common carrier to stipulate for exemption from responsibility for the negligence of the master or his servants"; third, "that these rules apply both to carriers of goods and carriers of passengers,and with special force to the latter"; fourth,"that where a person agrees with a carrier to enter in its employment at a certain place in the future,and in consideration of the mutual interests of both a free pass is given to the place of employment, with conditions on the back rendering the carrier nonliable for injuries caused by its negligence or that of its agents, and in traveling on the defendant's road to the place of employment the person is injured by the negligence of the carrier's agents, such person must be regarded as a passenger for hire, and not an employee, and the carrier is liable for damages caused the passenger for its negligence." The conditions printed on the back of the pass were properly rejected. The instructions were not subject to the objection made. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

NOTES.

Free Passes—Validity of Exemption from Liability.—In England it is well established that the carrier has full power thus to provide against liability, and a condition in the pass that the passenger travels "at his own risk" will exclude everything for which the company would otherwise have been responsible. McCawley *v.* Furness R. Co., L. R. 8 Q B. 57; Gallin *v.* London, etc., R. Co., L. R., 10 Q. B. 212; Hall *v.* North Eastern R. Co., L. R., 10 Q. B. 437. And this view is sanctioned by the courts of

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some of the states. Griswold *v.* New York, etc., R. Co., 53 Conn. 371, 26 Am. & Eng. R. Cas. 280, 55 Am. Rep. 115; Quimby *v.* Boston, etc., R. Co., 150 Mass. 365, 40 Am. & Eng. R. Cas. 693; Bissell *v.* New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369, *reversing* 29 Barb. (N. Y.) 602. And it is held that a stipulation exempting the carrier from liability, is not abrogated by the purchase of a ticket for a drawing-room car. Elrich *v.* New York Cent. R. Co., 108 N. Y. 80, 34 Am. & Eng. R. Cas. 350, 2 Am. St. Rep. 369. Others, while conceding the right to make such exemption in cases of ordinary negligence, refuse to apply the principle in cases of gross negligence. Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; Toledo, etc. R. Co. *v.* Beggs, 85 Ill. 80, 28 Amer. Rep. 613; Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 532; Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 27 Am. & Eng. R. Cas. 102, 58 Am. Rep. 848. Still others hold that such a stipulation will protect the carrier against the negligence of any of its servants and agents other than its managing officers or directors, the latter being regarded regarded as identical with the corporation itself. Welles *v.* New York Cent. R. Co., 26 Barb. (N. Y.) 64, 24 N. Y. 181; Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 281. In both of these cases, however, there was a divided court. Kinney *v.* New Jersey Central R. Co., 32 N. J. L. 407, 34 N. J. L. 513.

By the prevailing doctrine such stipulations are held to be contrary to public policy and therefore void. Gulf, etc., R. Co. *v.* McGown, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; Buffalo, etc., R. Co. *v.* O'Hara (Pa. 1882), 9 Am. & Eng. R. Cas. 317; Knowlton *v.* Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126; Bryan *v.* Missouri Pac. R. Co., 32 Mo. App. 228; McElwain *v.* Erie R. Co., 21 N. Y. Wkly Dig. 21; Rose *v.* DesMoines Valley R. Co., 39 Iowa 246. This case, however, was based upon the following statute: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding." See also New York Cent. R. Co. *v* Lockwood, 17 Wall. (U. S.) 357. This was a case of a drover's pass, but supports the principle contended for. Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 469; Steamboat New World *v.* King, 16 How. (U. S.) 469; Grand Trunk R. Co. *v.* Stevens, 95 U. S. 655. In this case it was held that the carrier could not lawfully stipulate against liability for negligence where the transportation, although

not paid for in money, was not a mere matter of gratuity, and the court strongly intimated that it would not have come to a different conclusion had the passage been a mere gratuity.

And in Indiana Cent. R. Co. *v.* Mundy, 21 Ind. 48, 83 Am. Dec. 339, the pass contained the following: "It is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property, while using the same on the trains of the company." It was held that such a stipulation does not cast upon the passenger any risks arising from the gross negligence of the servants of the railroad company in running the train, and it would seem that it does not cast upon the passenger any risk arising from any negligence of the servants of the railroad company in running the train. The court, while intimating that the weight of American authorities is opposed to allowing the carrier to exempt himself from liability for the consequence of his negligence, refrained from expressing any opinion on the question either way.

Employees as Passengers.—See McNulty *v.* Pennsylvania R. Co. (Pa.), 8 Am. & Eng. R. Cas., N. S., 685, and *notes*, p. 689 *et seq.*

CHICAGO, M. & ST. P. RY. CO.

v.

TOMPKINS *et al.*

(*Circuit Court, D. South Dakota, July 6, 1898.*)

Power of State to Fix Rates—Constitutional Law.*—Where a board of railroad commissioners, having authority from the state to fix fares and freight rates for the carriage of passengers and freight within its limits, have fixed such fares and rates, the complainant in an action in a federal court to restrain the board from putting them in force, in order to prevail, must prove that their enforcement will result in the taking of his property without due process of law, or will deprive him of the equal protection of the law.

Same—Indebtedness.—The contention that a railroad is entitled to pay all of its indebtedness before the state can regulate its charges for the carriage of passengers and freight within the limits of the state is without merit.

Computation of Intrastate Earnings.—In fixing rates, the state may properly consider the earnings of railroads from their interstate

*See note at end of case.

business within the state, as well as their earnings from intrastate business, it being proper to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and such per cent. being ascertained, to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings.

Reasonableness of Rates.—Where it appears that the local earnings of complainant under the board's proposed schedule will amount to from 12.1 per cent. to 18 per cent. per annum on the capital invested, the court will not find that the enforcement of such schedule will have the effect of depriving complainant of its property without due process of law, or deprive it of the equal protection of the law.

SUIT in equity against the board of railroad commissioners of the state of South Dakota.

George R. Peck, and *A. B. Kittredge*, for complainant.
T. H. Null and *W. O. Temple*, for defendants.

CARLAND, District Judge. The above-entitled action has been submitted upon pleadings and proofs. The object of the action is to perpetually restrain the defendants, as railroad commissioners of the state of South Dakota, from putting in force a certain schedule of rates and fares made by them on the 26th day of August, 1897, prescribing the rates and fares to be charged by common carriers within the state of South Dakota for the carriage of passengers and freight. At the time of the filing of the bill, a temporary injunction was issued, and the defendants have, in the meantime, been restrained from putting into effect the schedule referred to. The testimony that has been reported by the examiner is quite voluminous, consisting of about 1,000 pages of printed matter, but the testimony which must really decide this case is not of great length.

Case Stated.

In the first place, it is proper to state, briefly, the principles of law which have been established by the supreme court of the United States for the guidance of this court in deciding actions of this character.

In Smyth *v.* Ames, 169 U. S. 526, 18 Sup. Ct. 426, the supreme court declares the following principles of law to be settled :

"(1) A railroad corporation is a person, within the meaning of the fourteenth amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"(2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States.

"(3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In approaching the consideration of this case, guided by the above principles of law, the court fully appreciates the difficulty and embarrassment which surround the decision of a question where it is sought to have the court declare the legislative action of a state unconstitutional, and where the decision of the facts involved requires the exercise of knowledge with which the courts of justice are presumed to have but little acquaintance.

It is now settled law that a state, by legislative enactment, may directly itself, or through a board of commissioners, establish rates and fares for the carriage of freight and passengers between points within its limits. This being an exercise of lawful legislative authority on the part of the state, all acts in pursuance thereof, either by the state directly or by its commissioners, must be presumed, until the contrary clearly appears, to be within the legislative authority and valid. It necessarily follows, also, that when a board of railroad commissioners, authorized by a law of the state to fix rates and fares for the carriage of freight and passengers within its limits, fixes those rates, that those rates and fares are *prima facie* reasonable and just. It is also provided, by the act of the legislature under which the defendants are claiming to act, that the rates and fares established by them, or any schedule of such rates and fares, should be *prima facie* evidence that the rates are reasonable and just, in any controversy where they shall come in question.

Power of State to Fix Rates. Constitutional Law.

It thus appears that the burden of proof is upon the complainant to establish, beyond a reasonable doubt, that the rates and fares which the defendants are seeking to put in force will, if lawfully made and promulgated, result in the taking of complainant's property without due process of law, or will deprive the complainant of the equal protection of the law. In other words, the complainant must show the court that the acts of the defendant commissioners are unconstitutional, as being in conflict with the constitution of the United States.

While it is true that the legislature of a state may not, under its power to regulate rates and fares for the carriage of freight and passengers within its limits, deprive the complainant, or any other person or corporation, of its property without due process of law, or deprive it, or any other person, of the equal protection of the laws, it is also equally true that this court has no power or authority, given by statute or common law, to fix rates and fares for the carriage of freight and passengers upon the complainant's lines, or to revise in any manner rates established by the defendants as railroad commissioners. The court only has the power and jurisdiction to declare acts of the legislature, or of the board of railroad commissioners, performed in pursuance thereof, unconstitutional, if clearly in conflict with the constitution of the United States. No court will declare an act of a legislature unconstitutional without it is shown to be so beyond a reasonable doubt.

This, then, gives the status of the complainant in this action before this court. This court must be satisfied, beyond a reasonable doubt, that the schedule of rates proposed to be promulgated and put in force by the railroad commissioners, the defendants in this action, will, if so put in force, deprive the complainant of its property without due process of law, or deprive it of the equal protection of the law.

We now come to consider the evidence which has been reported in this action upon which it is asked that this court issue a permanent injunction against the defendants as railroad commissioners, enjoining them from putting into force the rates and fares complained of.

The first contention of the complainant is that the record shows that during the fiscal years ending June 30, 1894, 1895, 1896, and 1897, the complainant, under the rates and fares which are now in force upon its system for the carriage of freight and passengers, was not able to earn sufficient money to pay its operating expenses in the state of South Dakota,

its taxes in the state of South Dakota, and the interest due upon the bonded debt upon that portion of its lines located within the state of South Dakota, and that there was a deficiency between the earnings in the state of South Dakota, from all sources, during the said years, and the operating expenses, taxes, and interest of said years, of $2,729,858.81,—being $507,080.52 for the fiscal year ending June 30, 1894; $841,500.89 for the year ending June 30, 1895; $773,343.41 for the year ending June 30, 1896; and $607,933.99 for the fiscal year ending June 30, 1897.

If it is the law that the power of the state to regulate fares and rates for the carriage of passengers and freight within its jurisdiction does not arise or become operative until some railroad corporation has paid all the debts it may have seen fit to contract, or paid all the expenses which it is pleased to charge to the account of operating expenses, then the power in the state to regulate rates and fares is worthless, and of no avail to prevent the exaction of exorbitant charges from the public for the services rendered. This cannot be the law. No court has yet held it to be the law, and it is not believed any court will ever be found which will hold it to be the law. Such a proposition violates the rules of common sense and is maintained with a seeming forgetfulness that the power of the state to regulate the rates and fares for the carriage of freight and passengers cannot be contracted away and rendered nugatory by contracts between third parties to which the state has never consented to become a party.

Same. Indebtedness.

The case of Smyth *v.* Ames, *supra*, did not decide as to just how much a railroad corporation, or any other person or corporation, could earn before the state would have a right to reduce the rates and fares for the carriage of passengers and freight within its limits. It did say that just how such compensation may be ascertained, and what the necessary elements are in such an inquiry, would always be an embarrassing question. In the case of Road Co. *v.* Sandford, 164 U. S. 578, 17 Sup. Ct. 198, the supreme court said:

"Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the

owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of the property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

In regard to whether the contention of the complainant that it has a right to earn enough to pay all of its fixed charges, operating expenses, and taxes before the right of the state to interfere becomes operative, the supreme court in the case of Smyth *v.* Ames, 169 U. S. 543, 18 Sup. Ct. 432, says:

"In the discussion of this question, the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion; and, as it bears upon each case in its important aspects, it should not be passed without examination. In our opinion, the broad proposition advanced by counsel involves some misconceptions of the relations between the public and a railroad corporation. It is unsound, in that it practically excludes from consideration the fair value of property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the consti-

tutional guaranties for the protection of its property. Olcott *v.* Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation *v.* Southern Kansas Ry. Co., 135 U. S. 641, 657, 10 Sup. Ct. 965. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Road Co. *v.* Sandford, 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, 205, is pertinent to the question under consideration. It was there observed: 'It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative

authority. If a corporation cannot maintain such highway and earn dividends for stockholders, it is a misfortune for it and them, which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable'. A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment, in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."

This being the latest announcement by the supreme court upon this question, it must be taken as the law, and nowhere can it be gathered from its language that the complainant has a right to pay all of its indebtedness before the state can regulate its charges for the carriage of passengers and freight. The court, therefore, dismisses the proposition that the defendant railroad commissioners cannot reduce the present schedule of rates and charges now in force upon the complainant's lines merely because it is shown that the earnings therefrom do not pay the indebtedness and operating expenses of the complainant, as the complainant company itself never seems to have been able to adopt a schedule that would accomplish that object, nor, in face of the record, can the complainant claim that it ever adopted a schedule of rates and fares upon its lines within the state of South Dakota which was based upon the value of the services rendered. Mr.

Bird, general traffic manager of the complainant, a witness for the complainant, when upon the stand, testified as follows:

"I testified this morning that I had been in the service somewhat over thirty years, and had been engaged in making rates during that time, and I never have yet had an opportunity of making a tariff on a basis of what the service was worth. I have never had the opportunity to determine the rates by the value of the services. The rates are made what they must be."

The supreme court in the case of Smyth *v.* Ames, 169 U. S. 546, 18 Sup. Ct. 434, declared as follows:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Here is the rule,and the only question for the court now to ascertain is, what is the fair present value of the railroad property used by the complainant, in the state of South Dakota, upon which it is entitled to earn what the services rendered are reasonably worth?

There is no direct testimony in the record as to the present value of the complainant's railroad property in the state of South Dakota. There is testimony as to the original cost of rolling stock bought years ago; there is testimony as to the original cost of rails bought years ago; and there is the estimated cost of a good many articles of property, by the officers of the company, but in no case does any witness swear to the present actual value of any piece of property

owned and operated in the state of South Dakota by the complainant company. The only way that the court can get at the reasonably fair value of the complainant's property, used and operated as aforesaid, is by estimating, I might say guessing, just as the witnesses of the complainant have estimated and guessed, as to its value. The court was inclined at one time to be of the opinion that it was unable from the testimony to ascertain what the fair present value of the complainant's property in South Dakota was, in view of the conflicting statements of witnesses called upon that question, and the great disparity between the value of the property fixed by the company for the purpose of this suit and the value of the same property fixed for the purpose of taxation. But the court has carefully examined the testimony introduced in regard to the value of the property in question, and after considering all the circumstances and incidents, under the rules of the supreme court which should govern the court in fixing the value, the court is unable to find that the present fair value of the complainant's property in the state of South Dakota used for railroad purposes is to exceed $10,000,000. It is true that the record shows that the property is bonded and mortgaged for an amount largely in excess of this sum, but the amount of a mortgage upon property is no evidence of its value, and, therefore, is not worthy of consideration. Neither is the fact that a railroad company bought engines at a certain price 10 or 15 years ago any binding evidence that the engines now are worth a dollar, in the absence of any testimony as to where they have been used, how they have been kept, and what their present condition is. The record fairly shows that it is not the new property of the complainant company that is used in South Dakota.

This being fixed by the court as the fair and reasonable value of the complainant's railroad property, what would be a reasonable sum for it to charge for the services which it renders to the public? The supreme court in the case cited says that the state, in fixing its schedule of rates and fares for the transportation of passengers and freight, cannot consider and charge against the company its interstate earnings. While the complainant company strenuously insists upon the enforcement of this rule, it as vigorously insists that the per cent. which a state may allow the complainant to earn must be figured upon the total value of its property in the state, because all the business in the state of South Dakota transacted by the complainant is local

Computation of Interstate Earnings.

business, with the exception of an occasional train of cattle from Chamberlain, or an occasional train of wheat from Eureka, and that, therefore, all the cost of operation should be charged to the local earnings. In other words, that although for the four fiscal years ending June 30, 1894, 1895, 1896 and 1897 respectively the interstate earnings in the state of South Dakota were $4,026,682.21, still the state cannot charge against the road these interstate earnings, but may charge against the road its local earnings, the percentage of local earnings to be figured on the total value of the property in the state, thus leaving the interstate earnings relieved from any burden. Is this fair, is it just, for the company to say to the state of South Dakota that "while it is true that, in the four years mentioned, we have earned, on interstate business in the state of South Dakota, the sum of $4,026,681.21, still you cannot charge that against us, but you can only charge your local earnings, figured on the total valuation of our property ($10,000,000), and that local earnings are such a small percentage of the total value of the railroad in South Dakota that it does not give the company what the services are reasonably worth?"

The argument for the company is that the court cannot separate the value of the property with reference to the earnings because it requires all the property and all the machinery and all the labor to earn the local earnings. Admitting this to be so, it still remains that, during the years which the court has mentioned, the company earned, in interstate business, by the use of this property and under the franchises granted to it by the state of Sonth Dakota, the sum of $4,026,682.21. So that it is entirely unjust to make the local earnings bear the whole burden by ascertaining the per cent. of the total valuation that the local earnings would produce. No court as yet has promulgated any rule as to how the court shall arrive at a true and just valuation upon which to figure local earnings. In the absence of any such rule, this court believes that it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent., to take the same per cent. of the total value of the property as a fair value upon which to fix local earning. Following out this rule, let us take the four fiscal years immediately prior to the institution of this suit, and ascertain what per cent. the local earnings for these years would have earned upon a valuation thus determined, and what reduction

of that percentage will be made by the schedule sought to be promulgated by the defendants, and which it is stated reduces the present tariff of complainant, speaking in round numbers, 15 per cent. on local passenger business, and 17 per cent. on local freight business. The total earnings from all sources of the complainant company on its lines in the state of South Dakota, for the fiscal year ending June 30, 1894, were $1,840,651.79. The total local earnings for freight and passenger services during the same period were $407,606.35. In round numbers, this would make the local earnings 22 per cent. of the gross earnings from all sources for the year 1894. Twenty-two per cent. of $10,000,000, the value of complainant's property in the state of South Dakota, would be $2,200,000. The local earnings for said year, stated above as $407,606.35, using round numbers, would be 18.5 per cent. on said last-mentioned sum. The total earnings from all sources of the complainant company on its lines in the state of South Dakota, for the fiscal year ending June 30, 1895, were $1,236,680.78. The total local earnings for freight and passenger services during the same period were $330,642.85. In round numbers, this would make the local earnings 26 per cent. of the gross earnings from all sources for the year 1895. Twenty-six per cent. of $10,000,000, the value of complainant's property in the state of South Dakota, would be $2,600,000. The local earnings for said year, stated above as $330,642.85, using round numbers, would be 12.7 per cent. on last-mentioned sum. The total earnings from all sources for the fiscal year ending June 30, 1896, were $1,557,100.60. The total local earnings for freight and passenger services during the same year were $328,105.95. In round numbers, this would make the local earnings 21 per cent. of the gross earnings from all sources for the year 1896. Twenty-one per cent. of $10,000,000, the value of complainant's property in the state of South Dakota, would be $2,100,000. The local earnings for said year, $328,105.95, using round numbers, would be 15.6 per cent. on said last-mentioned sum. The total earnings from all sources, for the fiscal year ending June 30, 1897, were $1,605,210.66. The total local earnings from freight and passenger services during the same period were $311,005.42. In round numbers, this would make the local earnings 19 per cent. of the gross earnings upon all sources for the year 1897. Nineteen per cent. of $10,000,000, value of complain-

ant's property in the state of South Dakota, would be $1,900,000. The total earnings for 1897, $311,005.42, using round numbers, would be 16.3 per cent. on the last-mentioned sum.

It will thus be seen that the local earnings of the complainant's lines on the same proportion of the total value of the road as the local earnings bear to the gross earnings from all sources, in South Dakota, were: For the year 1894, 18.5 per cent.; for the year 1895, 12.7 per cent.; for the year 1896, 15.6 per cent.; for the year 1897, 16.3 per cent.

Now, let us ascertain the per cent. which the local earnings of the road for the four years mentioned would produce on the proportionate valuation above stated, after being reduced by the proposed schedule of the railroad commissioners. For the year 1894 the total local freight earnings were $137,459.88 which, being reduced 17 per cent., would equal $114,091.70. For the same year the total local passenger earnings were $270,149.47, which, reduced 15 per cent., would equal $229,624.50. These reduced local freight and passenger earnings equal $343,716.20. This reduction on the local business would reduce the total earnings from all sources from $1,840,651.79 to $1,776,761.64, of which amount the reduced local earnings for the year 1894 would be, in round numbers, 19 per cent. Nineteen per cent. of $10,000,000 would be $1,900,000, and the local earnings, as reduced, would be 18 per cent. of that amount. For the year 1895 the total local freight earnings were $121,442, which, being reduced 17 per cent., would equal $100,796.86. For the same year the total local passenger earnings were $209,200.85, which, being reduced 15 per cent. would equal $177,820.72. Total reduced local freight and passenger earnings, $278,617.58. This reduction on the local business would reduce the total earnings from all sources for that year from $1,236,680.78 to $1,184,655.51, of which amount the reduced local earnings for the year 1895 would be, in round numbers, 23 per cent. Twenty-three per cent. of $10,000,000 would be $2,300,000, and the local earnings for that year, as reduced, would be 12.1 per cent. of that amount. For the year 1896 the total local freight earnings were $110,432.45, which, being reduced 17 per cent., would equal $91,660.93. For the same year the total local passenger earnings were $217,673.50, which, reduced 15 per cent., would equal $185,022.47. Total reduced local freight and passenger earnings, $276,683.40. This re-

duction on the local earnings would reduce the total earnings from all sources for that year from $1,557,100.60 to $1,505,-678.05, of which amount the reduced local earnings for the same year would be, in round numbers, 18 per cent., and 18 per cent. of $10,000,000 would be $1,800,000, and the local earnings for that year, as reduced, would be 15.3 per cent. of that amount. For the year 1897 the total local freight earnings were $102,239.23, which being reduced 17 per cent., would equal $84,900.06. For the same year the total local passenger earnings were $208,716.19, which, being reduced 15 per cent. would equal $177,408.76. Total reduced freight and passenger earnings, $23, 308.82. This reduction on the local earnings would reduce the total earnings from all sources for that year from $1,605,210.66 to $1,556,514.06, of which amount the reduced local earnings for the same year would be, in round numbers, 16 per cent. Sixteen per cent. of $10,000,000 would be $1,600,000, and the local earnings for that year, as reduced, would be 16.2 per cent. of that amount.

It will be thus seen that, if the commissioner's schedule of rates and fares had been in effect during the four years that we have considered, there would have been an earning on the value of the property apportioned to local earnings of 18 per cent. for the year ending June 30, 1894; 12.1 per cent. for the year ending June 30, 1895; 15.3 per cent. for the year ending June 30, 1896; 16.2 per cent. for the year ending June 30, 1897. It certainly would be impossible for this court to find beyond a reasonable doubt that these per cents. allowed to be earned by the railroad company for local earnings would be depriving it of its property without due process of law, or depriving it of the equal protection of the laws. The court has not overlooked operating expenses, or the difference between the cost of earning local and interstate earnings; but the court is of the opinion that, when the local earnings under complainant's schedule show for the years 1894, 1895, 1896, and 1897 a percentage on capital invested of 18.5 per cent., 12.7 per cent., 15.6 per cent., and 16.3 per cent., respectively, and for the same years under defendants' proposed schedule a percentage of 18 per cent., 12.1 per cent., 15.3 per cent., and 16.2 per cent., then the small reduction, taken in connection with the high percentages earned under it, makes it unnecessary to discuss what the exact amount of the profits would be. This being the view

of the court, it necessarily results that the bill must be dismissed, and the temporary restraining order granted in this action dissolved.

NOTE.

Railroad Commissions.—As to powers of Railroad Commission, see Stevenson *et al. v.* Great Northern Ry. Co. (Minn.), 8 Am. & Eng. R. Cas., N. S., 559, and *notes*, p. 613, where the cases are collected.

See also State *v.* Wrightsville & T. R. Co., (Ga.), 11 Am. & Eng. R. Cas., N. S., 576; State *ex rel.* Railroad Commission *et al. v.* Wilmington & W. R. Co. (N. Car.), 11 Am. & Eng. R. Cas., N. S., 671; Town of Bristol *v.* New England R. Co. (Conn.), 11 Am. & Eng. R. Cas., N. S., 674.

BRUNSWICK & W. R. CO.

v.

MOORE.

(*Supreme Court of Georgia, July 9, 1897.*)

Carriers of Passengers—When Liability Terminates.*—Where the relation of carrier and passenger is once established, unless that relation be terminated by the voluntary act of the passenger, or by the carrier under circumstances which would justify such a course, it continues until the passenger is safely deposited at his point of destination, and until he has left, or has had a reasonable time within which to leave, the premises of the carrier; and if, during the continuance of this relation, he suffer injury in consequence either of the negligent, wrongful, or wanton tort of one of the carrier's servants, the carrier is liable.

Instructions—Case at Bar.—The requests to charge, so far as legal and applicable to the case as presented by the evidence, were sufficiently covered by the general charge given to the jury, and the charge as a whole fairly submitted the law bearing upon the issues in dispute.

Evidence Justifies Verdict.—The verdict is supported by the evidence, and is not excessive.

(Syllabus by the Court.)

*See notes at end of case.

Brunswick & W. R. Co. *v.* Moore

ERROR by defendant from Coffee county superior court *Affirmed.*

D. H. Pope, for plaintiff in error.
E. D. Graham, for defendant in error.

ATKINSON, J. The questions made in this case arose upon the following state of facts: Aaron Moore, as next friend of his son William, sued the railroad company, and obtained a verdict for $3,000. Defendant made a motion for a new trial, which being overruled, it excepted. The material testimony introduced upon the trial may be stated as follows: William Moore testified that he was 17 years of age; that he and eight other boys entered defendant's train at Alapaha, and traveled thereon as passengers to Willacoochee, a distance of 11 miles, on the night of February 9, 1896. The train stopped at Willacoochee not more than four or five seconds, just long enough for Moore to leave it. He had just reached the ground, and taken two steps, when a shot from a pistol, fired by the conductor of the train, struck him in the leg. The ball broke and went on both sides of the bone. One piece had to be cut out in one place, and the other in another place. He suffered great pain from the wound, was confined to bed for a week, after which he went around on crutches and with a stick, and about a month afterwards had to have another piece of the ball cut out which had not been found at first. He denied that he applied to the conductor the opprobrious epithet testified to by the conductor, or that he (plaintiff) had anything in his hand. The conductor testified that after making the usual stop at Willacoochee he gave the signal for the train to go ahead, and it had gone about a car length and a half when he heard some one say "You damned old white-headed son of a bitch." He leaned out, and saw a man running along by the side of the train, and it looked like he had something in his right hand. He said, "It is you I am talking to, you damned white-headed son of a bitch," and the conductor shot him. He was running along by the side of the coach. The conductor could not recognize this boy, but he could see it was a white man, and that was all. Plaintiff testified that he did not run along by the side of the train and curse the conductor, that the train was moving along when the shot was fired at him. The defendant introduced and examined several witnesses who had been summoned by the plaintiff, and separated at defendant's request. In some particulars their testimony tended to support Moore, and in other the conductor.

Case Stated.

It was alleged that the court erred in charging the jury as follows: "Or if you find that, after arrival at this point of destination, and alighting from the train, and having a reasonable time to make his exit from the premises of the defendant company, and while the train was moving off, or in the act of leaving, that he followed after it, pursued it, that there was some trouble existing, that a reasonable time for William L. Moore to have made his exit from the premises of the company had been allowed, which had not been done, but pursued and followed after the train, that whatever trouble may have occurred at such a time as that, then, under the rules, the court charges you that relations and duties existing between the conductor and the passenger would have ceased; and if the conductor then shot William L. Moore, wounding and injuring him, the court charges you that if you should find that to be true of this matter, then, in that event, the plaintiff would not be entitled to recover damages from the defendant railroad company." Error is assigned upon this charge, in that it impresses on the minds of the jury that at all hazards, and under all circumstances, the plaintiff must have had time to have made his exit, not only from the train but from the premises of the defendant, regardless of the condition of the plaintiff, before the liability of the defendant as a carrier of passengers ceases. There were certain requests to charge, which were fully covered by the principle announced in the charge given, and, if the rule of law be well stated in the instruction excepted to, there is no reason for the consideration of the proposition contained in the requests.

Instructions—Case at Bar.

1–3. It will be seen from an examination of the evidence that the plaintiff was accepted by the defendant as a passenger, and as such he traveled from the initial point of his journey to the point of destination he had in contemplation at the time he entered the company's cars. If he were a passenger at the time the injuries were inflicted upon him for which he brings this action, he was entitled to recover, for he is entitled, by virtue of his contract of passenger carriage, not only to be protected against the consequences of the negligent acts of the company's agents, resulting from the omission to perform its duties towards the passenger, but he is likewise entitled to be protected against the wanton and willful acts of violence wrongfully committed upon his person by the servants of the company during the continuance

Carriers of Passengers—When Liability Terminates.

of the relation instituted by his contract with the company. Whether or not he was a passenger at the time the injuries were inflicted upon him depends upon whether, at that time, it had completed its contract of carriage with him, and, in the legal sense, delivered him at the point of destination. There was no voluntary abandonment by this passenger of his right safely to be delivered at the point of destination in accordance with the contract under which he entered the company's cars. Its servants did not, for any improper conduct upon his part, seek to expel him from the car, and thus terminate the relation of carrier and passenger; so that the relation of carrier and passenger, having commenced, continued until the carrier had fully performed its contract of carriage. It does not satisfy the requirements of this contract that the passenger should have been safely transported to the point at which he was expected to, and did, leave the car of the company. Until he had actually left, or had had a reasonable time within which to leave, the premises of the company at the point of destination, he was still a passenger, and entitled, as against the company, to all the rights and immunities of a passenger. This was the rule laid down by the court in its instruction to the jury. It was the correct rule, and consequently this instruction afforded no ground for the granting of a new trial. 2 Am. & Eng. Enc. Law, p. 745, and cases there cited; 4 Elliott, R. R. § 1592. Whether or not the plaintiff's version of this transaction was true was a question of fact for the jury. They believed it, returned a verdict in his favor, and the trial judge has approved their finding. It is amply supported by the evidence. In view of the circumstances under which the injury occurred, the nature of the wounds inflicted, it was not excessive, and this court will not control the discretion of the trial judge in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

Evidence Justifies Verdict.

NOTES.

When Relation of Carrier and Passenger Terminates.—The relation of carrier and passenger does not cease until the journey, expressly or impliedly contracted for, has been concluded. Gilhooly *v.* New York, etc., Steam Nav. Co., 1 Daly (N. Y.) 197. It does not terminate, however, at the moment the passenger alights from the

Notes

carrier's vehicle, by its invitation, at a place selected by the carrier at the point of destination, but continues until the passenger has left the carrier's premises. Hansley *v.* Jamesville, etc., R. Co., 115 N. Car. 602, 44 Am. St. Rep. 474; Pittsburg, etc., R. Co. *v.* Krouse, 30 Ohio St. 222. Or until he has had a reasonable opportunity to leave the carrier's premises. Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208; Burnham *v.* Wabash Western R. Co., 91 Mich. 523; Ormond *v.* Hayes, 60 Tex. 180.

Illustrations.—Thus a person who, after alighting from a train, walks along the station platform, still remains a passenger. Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 3 Am. Neg. Cas. 838. And a passenger who leaves the train after the station is called and the train has stopped, and is injured before leaving the grounds by an engine approaching without warning, is still a passenger. Pittsburgh, etc., R. Co. *v.* Martin, 3 Ohio Dec. 93.

The relation of carrier and passenger does not necessarily cease where the latter, after alighting from the car, aids the carrier's servants in removing his baggage from the car; nor does the act of so aiding make him a servant of the carrier. Ormond *v.* Hayes, 60 Tex. 180.

A passenger who had reached his destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and had started to cross the track, but not upon his way to the station, and who was injured while so crossing, had ceased to be a passenger before the accident. Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, 34 Am. & Eng. R. Cas. 563.

But if a passenger, being a stranger to the station and surroundings, finds himself, almost immediately after alighting from a train, left in utter darkness by the extinguishment of the station light by the agent, the railroad cannot claim that the passenger is a wrongdoer if he, in his effort to get to a place of safety, or for information, crosses other ground of the defendant than that upon which the station is actually erected. Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Same—Reasonable Time to Depart from Premises.—The relation of carrier and passenger does not necessarily continue until the passenger has reached his place of destination and has actually left the car; and whether he has had time to do so may not always be decisive of the question. So, where a passenger has had reasonable time and opportunity to leave the car and does not do so, he thereby forfeits the rights due him as a passenger. Chicago, etc., R. Co. *v.* Barrett, 16 Ill. App. 17; Jeffersonville, etc., R. Co. *v.* Parmalee, 51 Ind. 42. And such reasonable time is the time within which persons of ordinary care and prudence, under like circumstances, get off the cars. Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

If the train stops long enough for him to get off, then the company has done all it can. Central R. Co. *v.* Whitehead, 74 Ga. 441.

Remaining on a train half an hour after reaching its destination has been held to terminate the relationship, especially where the station is the terminus of the road. Chicago, etc., R. Co. *v.* Frazer, 55 Kan. 582.

Same—Misconduct of Passenger.—The passenger may relinquish his rights as such by some act or misconduct of his own. Chicago, etc., R. Co. *v.* Barrett, 16 Ill. App. 17; Louisville, etc., R. Co. *v.* Johnson, 92 Ala. 204, 47 Am. & Eng. R. Cas. 611. Such misconduct may consist in a refusal to pay fare. Hurt *v.* Southern R. Co., 40 Miss. 391; St. Louis, etc., R. Co. *v.* Carroll, 13 Ill. App. 585; Sherman *v.* Chicago, etc., R. Co., 40 Iowa 45, 8 Am. Ry. Rep. 410; Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290; Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106, 18 Am. & Eng. R. Cas. 304; Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 57 Am. Rep. 543, 23 Am. & Eng. R. Cas. 470; Cresson *v.* Philadelphia, etc., R. Co., 11 Phila. (Pa.) 597; People *v.* Jillson, 3 Park Cr. Rep. (N. Y. Supreme Ct.) 234.

Failure to have his ticket stamped. Cloud *v.* St. Louis, etc., R. Co., 14 Mo. App. 136; Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 40 Am. &. Eng. R. Cas. 666.

Detaching coupons. Boston etc., R. Co. *v.* Chipman, 146 Mass. 107, 4 Am. St. Rep. 293, 34 Am. & Eng. R. Cas. 336; Houston, etc., R. Co. *v.* Ford, 53 Tex. 364; Louisville, etc., R. Co. *v.* Harris, 9 Lea (Tenn.) 180, 16 Am. & Eng. R. Cas. 374; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234.

Attempting to use invalid ticket. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8; Wyman *v.* Northern Pac. R. Co., 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

Or refusing to comply with the reasonable rules of the carrier. Manning *v.* Louisville, etc., S. Co., 95 Ala. 392, 36 Am. St. Rep. 225; Lake Erie, etc., R. Co. *v.* Mays, 4 Ind. App. 413.

LOUISVILLE & N. R. CO.

v.

KELLER.

(*Court of Appeals of Kentucky, Nov. 26, 1898.*)

Passenger Exposed to The Weather after Alighting from Train—Insulting Passenger—Liability of Company.*—It appeared that

*See notes at end of case.

when the train upon which plaintiff was a passenger reached her destination it was raining and hailing very hard, and when she attempted to reach the depot for shelter she found the way blocked by a freight train, and she was compelled, owing to the danger of being run over by one of the trains if she attempted to reach the depot by an indirect route, to wait from 2 to 10 minutes, exposed to the weather, until the freight train moved off; and that she was laughed at and tantalized by defendant's employee upon the train she had left, while she was so waiting. *Held*, that plaintiff did not cease to be a passenger when she left her train, and was entitled to protection from the weather in defendant's depot for a reasonable length of time to prepare to resume her journey, and was entitled to have an unobstructed route from the train to the depot.

Damages.—A verdict for $260 was not excessive.

Exemplary Damages.*—It was not error to instruct the jury that they might give punitive damages because of such insulting conduct on the part of the train men.

APPEAL by defendant from Bullitt county circuit court. *Affirmed.*

Fairleigh & Straus and *Edward W. Hines*, for appellant. *Charles Carroll*, for appellee.

WHITE, J. The facts of this case appear to be that appellee, in company with some other ladies and a little boy, bought tickets for passage over appellant's road, at Louisville, to go to Shepherdsville. They were carried the distance, and when the passenger train reached the station at Shepherdsville it was raining and hailing very hard. Appellee was assisted from the passenger train by the brakeman to the ground, and there left. She had no umbrella. It was raining and hailing. Just before this passenger train came to the depot a freight train of 31 cars came also to the depot, and this freight train was on the track between the depot and the passenger train from which appellee alighted. To seek shelter from the storm, appellee must either crowd under the freight train and get into the depot, or go around the freight train and go back to the depot on the other side of the freight train. To go around the freight train, appellee must travel between the tracks, with a train on either track; and to go the shorter distance would be to go in front of the engine, something near 100 yards,—the other

Case Stated.

way, about 200 yards,—and then the same distance back to the depot. On the side of the passenger train opposite the freight train there was no house, and, on account of a wire fence, appellee could not have gotten out that way. Appellee did neither of these things, but stood there in the storm, without protection from the rain and hail, till the freight train was moved out of the way, this time variously estimated at from two to ten minutes. The proof shows that while appellee was thus subjected to the rain and storm she was laughed at and tantalized by some of the employees on the train.

When appellee reached the depot, she was wet and her clothes soiled. There she found her friend waiting, and she went her way. This action was brought for the damage for being compelled to remain in the storm, because no shelter was provided, or rather because of the negligent obstruction by the freight train of the way to the depot. Appellant, by its answer, denied all negligence; denied its duty to keep an unobstructed passage to its waiting room from the train; denied that, at the time appellee was subjected to the wetting from the storm, it owed her any duty, or that she was then a passenger; pleaded that the injury was caused by the act of God, and not by any negligence or carelessness on its part.

A trial resulted in a verdict for appellee in the sum of $260.

After motion and grounds for new trial had been overruled, this appeal is prosecuted.

The reasons assigned for a new trial are: Refusal to peremptorily instruct the jury to find for appellant; in giving instructions to the jury; in refusing instructions asked for by appellant; that the verdict is contrary to law and not supported by the evidence, and is excessive.

Counsel for appellant contends that, when appellee was assisted from the passenger train at the depot for which she purchased her ticket, the appellant ceased to owe her any duty; that she ceased to be a passenger, and the appellant was not negligent in permitting the freight train to stand on the track nearest the depot; and that, as there was a way open between the tracks to go to the town of Shepherdsville, appellee, if she desired shelter, should have gone that way, and in any event she must have been exposed to the storm and rain in going to Shepherdsville, even if the freight train had not been where it was. Counsel, on this premise, argues conclusively that the case must be reversed, for several reasons. We cannot assent to such a proposition. We are of the opinion that

Notes

Passenger Exposed to the Weather after Alighting from Train—Insulting Passenger—Liability of Company.

appellee did not cease to be a passenger when she alighted from the train; but, on the contrary, was a passenger, and entitled to protection from the weather, in the depot of appellant, for a reasonable length of time to prepare to resume her journey. Being entitled as a passenger to the use of depot for shelter, she was likewise entitled to an open and unobstructed way thereto, and especially is this true under such circumstances as were here presented.

The instructions given present the law more favorably to appellant than it was entitled to, as they, in effect, tell the jury that appellee must have sought shelter in Shepherdsville, when she had a right to shelter at the depot where she alighted. The instructions refused were properly so, for two reasons: First, they were erroneous and did not state the law; second, they were, in effect, given, and as given are more favorable to appellant than it was entitled to. We are also of the opinion that the instructions permitting punitive damages were properly given, as the facts proven in the case show that appellant was guilty of gross negligence in obstructing the way to the depot. Appellee had a right to alight from the train at the place provided for shelter for passengers, either to or from Shepherdsville; and, with this way obstructed as it was shown to be, the practical effect was to put appellee off the train 200 yards from the depot in a storm. This it could not do. The verdict is not excessive, and is not flagrantly against the evidence.

Appellant also complains of the action of the trial court in giving to the jury an instruction authorizing punitive damages. This was not error. The conduct of the servants and em-

Damages—Exemplary Damages.

ployees on the train, if true, authorized an instruction on punitive damages. Finding no error prejudicial to appellant, the judgment is affirmed, with damages.

NOTES.

Carriers of Passengers—When Liability Terminates.—See Brunswick & W. R. Co. *v.* Moore, *ante*, and *note*.

Insulting Passengers—Exemplary Damages.— As to female passengers there is an implied undertaking upon the part of the company that it will protect them against obscenity, immodest conduct, or wanton approach. Mere "indecorous" conduct, however, even toward a female passenger, is not sufficient to authorize exemplary damages. Louisville & N. R. Co. *v.* Ballard, 28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530.

CHICAGO & A. R. CO.

v.

WINTERS.

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Injury to Passenger on Track—Excessive Speed within City Limits.*—Where a person is injured by a railroad train running within the limits of a city at a greater rate of speed than permitted by an ordinance of the city, the company is *prima facie* guilty of negligence.

Credibility of Witnesses—Instructions.—An instruction as to the proper manner of weighing the testimony of witnesses is not erroneous merely because the jury are told therein that they may consider, among other things, the relationship of witnesses to the parties in the suit and any feeling of interest or partiality on the part of witnesses which may have been shown by the evidence, for or against either of the parties, although the witnesses for defendant, a railroad company, were its employers.

Carriers of Passengers—Persons in Charge of Live Stock.*—A person traveling, with the consent of the railroad company, upon a freight train, in charge of stock carried by the company, is a passenger.

Same—When Relationship Terminates.*—A person continues to be a passenger after alighting, while rightfully walking from the train upon the company's premises.

Inviting Passenger to Alight at Dangerous Place—Negligence.*—It appeared from the preponderance of evidence that plaintiff, a passenger, was properly invited to alight by the conductor, but was permitted to alight on the side of the train where the conductor knew that a fast train was due in about five minutes; and that plaintiff, in ignorance of this fact, while walking from the train on the 4 foot space between the tracks was thrown down by the motion of the fast train, and injured by it. *Held*, that a verdict for plaintiff was warranted by the evidence.

Instructions.—It was not error to refuse a requested instruction in which a controverted fact was assumed to be established by the evidence.

Special Interrogatories.—It was not error to refuse to submit special interrogatories merely relating to evidentiary facts.

*See notes at end of case.

Chicago & A. R. Co. *v.* Winters

APPEAL by defendant from appellate court, Third district. *Affirmed.*

This is an action on the case, brought by the appellee against the appellant company, to recover damages for a personal injury. The declaration consisted originally of six counts, but the first, second, fourth, and fifth counts were stricken out or withdrawn, and the third and sixth counts only were left standing. The defendant pleaded the general issue. The case was tried before the court and a jury, and resulted in verdict and judgment in behalf of the appellee (the plaintiff below). This judgment has been affirmed by the appellate court, and the present appeal is from such judgment of affirmance.

Case Stated.

The third count of the declaration alleges that the appellee was lawfully, and by invitation of the appellant (the defendant below), on the grounds of appellant within the corporate limits of the city of Bloomington, at a point between Mason and Washington streets; that an ordinance of said city prohibited the appellant from running its passenger trains at a greater rate of speed than ten miles per hour, and its freight trains at a greater rate of speed than six miles per hour, in said city, between said streets; that appellant's servants ran a certain passenger train on said railroad between said streets, in said city, on the night of December 12, 1893, at a greater rate of speed than was permitted by the ordinances of the city; and that the appellee, while on the grounds of appellant by its invitation, and while using due care for his own safety, was knocked down and injured, etc. The sixth count of the declaration alleges that the appellee was a passenger on appellant's railroad car, to be carried from Nilwood to Chicago; that it was the duty of appellant to safely convey and keep appellee from all unnecessary danger, and not to expose him to needless peril, while so being a passenger; that, while appellee was so a passenger at Bloomington, and on the grounds of appellant's railroad, appellant, by its agents, invited him to alight from said train of cars at a time and place of needless peril, appellant knowing and appellee at the time not knowing, of the perils of the time and place; that appellee then and there alighted from said train on appellant's ground at the invitation and suggestion of appellant; and that upon so alighting at such place, and while in the exercise of due care to guard against injury, appellee then and there was thrown and caused to fall down by the motion of a certain rapidly moving train of the appel-

lant,or by the swift currents of air set in motion by said train, and was thereby injured.

The facts developed by the testimony are substantially as follows; On December 12, 1893,appellee, who was a farmer, shipped from Nilwood, in Macoupin county, a car load of sheep over appellant's road to Chicago, and took passage on the same train, riding in the caboose, to accompany his sheep to Chicago. When appellee boarded this train, there were in the caboose two other parties accompanying their stock to Chicago, who had boarded the train at points further south than Nilwood. On the way from Nilwood to Bloomington, other cars of live stock were added to the train, and six other shippers of stock likewise took passage in the same caboose. When the train, which was a freight train, arrived at Bloomington, there were nine shippers of stock in the caboose, including the appellee. Appellee had made but two similar trips to Chicago. The train arrived at Bloomington after night, and stopped at the hour of 9:40 p. m. on the west track of the appellant about a block and a half south of the switch yard of the appellant at Bloomington. There was another track upon the appellant's right of way, east of the track upon which the freight train stopped; and the space between the two tracks was about eight feet. The evidence shows that it was the custom of the railroad company, when a freight train of this character arrived at Bloomington,to make up a new train to go on from Bloomington to Chicago. Upon the new train thus made up, another conductor than the one arriving on the train at Bloomington took charge from Bloomington to Chicago, and another caboose than the one arriving at Bloomington was attached to the train newly made up to go to Chicago. It was thus necessary for the appellee and the other stockmen with him to alight from the train on which they arrived in Bloomington, and go into the other caboose attached to the newly made up train. It was sometimes difficult for the stockmen to find the caboose attached to the new train, in order to enter it, after the train was made up in the switch yard. Some of the witnesses say that it was oftentimes necessary for them to hunt for the caboose attached to the new train, in order to find it.

When the freight train thus reached a point on the west track at 9:40 o'clock at night, a block and a half south from the switch yards, the conductor and brakeman of the freight train were in the caboose with the stockmen, and asked them if any of them desired to get lunch. Several responded in

the affirmative. The conductor then told them to get off at that point, and walk north a block and a half, to where the lunch counter was. He stated to them that the freight train would probably remain at that point for some time, and that, if they waited until the train reached the switch yards, it might move on before they would have time to get lunch. The freight train stopped on the west track, at the point indicated, to await a signal to pull up into the switch yard. The stockmen, including the appellee, then alighted from the caboose of the freight train in which they had been riding and walked north, on the east side of the freight train, towards the switch yard. Just after they so began to walk northward, the freight train began to move north, going at first slowly, and then more rapidly. While the appellee and the other stockmen were thus walking north, a fast passenger train, coming from the north and going south, passed down on the east track, so that the stockmen were thus caught between the two trains. The passenger train which thus passed to the south, on the east track, was due at Bloomington about 9:45 p. m., and seems to have been about on time this evening. The testimony shows that the space between the two moving trains, the freight train moving north, and the passenger train moving south, was only about four feet. The night was cold and the ground was frozen. Appellee was walking in the rear of the other stockmen, and in some way, by the motion of the trains, or by the current of air created by their motion, he was knocked down, and one of his legs was so crushed by the passenger train that it had to be amputated.

Rinaker & Rinaker, for appellant.
Anderson & Bell, for appellee.

MAGRUDER, J. (after stating the facts). Counsel on both sides have filed in this court the briefs prepared by them for the appellate court. The briefs are largely taken up with discussions of facts. Two prominent questions of fact are discussed by counsel for appellant in their brief. One of these questions of fact is whether or not the passenger train which came down the east track was running at a rate of speed prohibited by the ordinances of the city of Bloomington. The other question of fact is whether or not the appellee was requested or invited by the conductor or brakeman, or both of them to alight from the freight train, and walk along upon the right of way of the appellant towards the switch yard, in the manner set forth in the statement preceding this pinion.

1. Section 87 of chapter 114 of the Revised Statutes provides that "whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine, or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive engine, or car; and the same shall be presumed to have been done by the negligence of said corporation or their agents." 2 Starr & C. Ann. St. p. 1941. The evidence was conflicting as to the rate of speed at which the passenger train was running, the witnesses of the appellant placing it at 10 miles an hour, and the witnesses for the appellee placing it all the way from 15 to 25 and 30 miles per hour. It was for the jury to determine whether the testimony of the appellee's witnesses, or that of the appellant's witnesses, was to be believed. The lower courts have found against the appellant upon this question as to the rate of speed, and we are concluded by their judgments. The jury found that the passenger train was traveling faster than it was authorized to do under the ordinances of the city, and, this being so, the defendant was *prima facie* guilty of negligence.

Injury to Passenger on Track —Excessive Speed within City Limits.

Counsel for appellant claim that the witnesses for the railroad company upon the question of the speed of the train were expert witnesses, and better capable of judging as to such rate of speed than the witnesses introduced by the appellee; and it is said that the appellant would not have been found guilty under the third count of the declaration if the jury had not been misled by the first instruction given for the appellee. The first instruction thus complained of told the jury that they were the judges of the degree of credit which should be given to the testimony of the several witnesses in this case; that the jury, in determining how far each witness was entitled to credit, may take into consideration the apparent intelligence of such witness, his means of knowledge, his manner of testifying, as shown by the evidence; his relationship to the parties in this suit, if any be shown; any feeling of interest or partiality which may be shown by the evidence, for or against either of the parties; the extent to which such witness may be corroborated or disputed by other credible evidence in the case, and all the facts and circumstances in evidence,—

Credibility of Witnesses—Instructions.

and that the jury should give to the testimony of each witness such weight as, in their opinion, it was entitled to receive. The first instruction, as to the various tests laid down by it, is fully sustained by the authorities, as may be seen by reference to Sack. Instruct. Juries (2d Ed.) pp. 31, 32, and the cases there cited. Counsel for appellant says that the instruction is misleading, and that it singles out the witnesses for the appellant, and covertly makes an attack upon them. We do not think that the instruction is justly liable to such a charge. It refers no more to the witnesses of the appellant than to those of the appellee. It is said that, by mentioning the relationship of the witnesses to the parties, reference is made to the relation of employer and employee which existed between the appellant and its witnesses. The instruction no more contemplates such relationship than the relationship which may have existed between appellee and the other stockmen upon the caboose, as being all passengers upon the train, and all engaged in the business of looking after their stock, and accompanying it to the place of shipment. As the instruction authorized the jury to take into consideration the means of knowledge possessed by the witnesses, they were authorized thereby to give to the testimony of appellant's witnesses, upon the subject of the speed of the train, such weight as it deserved, if such witnesses, by reason of being experts in such matters, had means of knowledge superior to the means possessed by the appellee's witnesses. In most of the cases referred to by counsel as sustaining their objection that the first instruction singles out the witnesses for the appellant, the names of particular witnesses were mentioned, and the instructions were condemned on that account. Clevenger *v.* Curry, 81 Ill. 432; Insurance Co, *v.* La Pointe, 118 Ill. 384, 8 N. E. 353; Pennsylvania Co. *v.* Versten, 140 Ill. 637, 30 N. E. 540. The instruction here complained of contains no such defect as that condemned in these cases.

2. It is contended by appellant's counsel that the appellee had no right to recover under the sixth count of the declaration. The main question discussed, in relation to the evidence and instructions applicable to the sixth count, is the question whether or not the appellee was invited to alight from the caboose, and walk along upon the grounds of the appellant. The conductor, it is true, swears that he told the appellee and the other stockmen who were in the caboose that they had better remain in the caboose until the freight train

arrived at the switch yards; but the appellee and seven or eight other stockmen, who were in the caboose with him, and who heard what the conductor and brakeman said, all swear, in substance, that they were told by the conductor to get out, and walk up a block and a half to the place where the lunch counter was. When the freight train stopped, at 9:40 o'clock in the evening, neither appellee, nor any other of the stockmen, asked any question of or any information from the conductor in regard to lunch, or in regard to the length of time the train would stop, or in regard to any other matter. The conductor himself first introduced the subject of lunch, by asking the appellee and the other stockmen, who had been on the freight train, most of them, since 1 o'clock, whether they desired to get lunch. The conductor says himself that it was a part of his business to ask them whether they wanted lunch, and that he had received from his superior officers directions to do this. There was a bulletin directing him to inquire of shippers on the train for such of them as wanted to get lunch. When some of them stated that they desired to get lunch, he told them that they had better get off at that point, and walk northward. The conductor and the brakeman were in the caboose with the appellee and the other stockmen, and saw them alight. They say the appellee and the others got off, and started to walk on the east side of the freight train. The conductor knew that the fast passenger train from the north was due at Bloomington at 9:45 o'clock p. m. The appellee was not aware that such a passenger train was coming at that time. The conductor did not warn the appellee that it was dangerous to walk up on the east side of the freight train, nor did he warn him that at that time a passenger train would approach or was due on the east track. He did not state to the appellee that it would have been safer to have walked up on the west side of the freight train. There is evidence tending to show that there was no graded street upon the west side of the west track, upon which the freight train stood, and that on the way to the switch yard there was an embankment and a cut, which it would be difficult to pass for one walking on the west side, especially on a dark winter night. Counsel are mistaken in saying that the relation of carrier and passenger did not exist between appellant and the appellee when the appellee alighted from the freight train. He was obliged to alight from the caboose in which he was, in order to get into another caboose, which was to be attached

to a new train, to be made up a block and a half north of the point where the freight train had stopped. Independently of any question of obtaining lunch, it was necessary to alight from the one caboose in order to take the other caboose.

We have held that a person who is traveling, with the consent of the railroad company, upon a freight train, in charge of stock or goods carried by the company for him, is a passenger. Railroad Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Railway Co. *v.* Rood, 163 Ill. 477, 45 N. E. 238. This relation between the passenger and the railroad company does not cease upon the arrival of a train at the place of the passenger's destination, but the company is still bound to furnish him an opportunity to safely alight from the train. He continues to be a passenger while he is rightfully leaving the train. If the train has reached a point where the passenger may lawfully leave it, and no direction is given him to alight on the side of the train where there is no danger, but he is permitted to alight upon the side where there is danger, it is a question for the jury whether reasonable care for the safety of the passenger has been used by the railroad company. Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713. Moreover, "the direction, invitation, or assurance of safety given by a servant of the company may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have. * * * One who obeys the instructions or directions of another, upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action for injuries received in attempting to follow out the instructions." Railroad Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197; Railroad Co. *v.* Rayburn, 52 Ill. App. 277; Railroad Co. *v.* Wilson, 63 Ill. 167; Railroad Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204; Railroad Co. *v.* Lane, 83 Ill. 448; Buckley *v.* Railroad Co., 161 Mass. 26, 36 N. E. 583. We are unable to say that the jury erred in finding that the appellant was guilty of negligence, in view of what was said to the appellee and the other stockmen by the conductor, and in view of what the appellee and the other stockmen did in consequence of such statement made to them by the conductor. It was said in Railroad Co. *v.* Wilson, *supra*, that railroad companies "have no right to invite the traveling public to occupy positions of peril." In all the

Carriers of Passengers—Persons in Charge of Live Stock.

Same—When Relationship Terminates.

Inviting Passenger to Alight at Dangerous Place—Negligence.

cases above referred to, where a passenger dismounted from a train at a place of danger, or went from a safe place on a train to enter a part of the train which was dangerous, and was injured in so doing, and where it was held that such passenger was not entitled to a right of recovery of damages for such injury against the railroad company, it appears that such movement of the passenger, in alighting from the train or in changing his position on the train, was not done by any direction or invitation of the conductor of the train or other servant of the company.

Counsel rely upon the case of Railroad Co. *v.* Hazzard, 26 Ill. 373, as sustaining their contention that there can be no right of recovery in this case. It must be remembered that the Hazzard Case was decided on appeal directly from the circuit court to this court, and when this court was in the habit of passing upon questions of fact, and reversing judgments where the verdict of the jury in the court below was against the weight of the evidence. In addition to this, an examination of the Hazzard Case will show that the facts there are different from the facts of the case at bar. It appeared there that Hazzard alighted from a freight train before it reached the regular stopping place; but he did so of his own motion, and not because of any invitation or suggestion to do so, coming from any servant or employee of the railroad company. On the contrary he asked the conductor if he could get off at the point where he contemplated alighting, and the conductor merely answered that business men did get off at that point. In other words, the passenger in the Hazzard Case asked information of the conductor, and, when he received the information, exercised his own judgment in acting upon it. In the case at bar, however, appellee asked no information from the conductor of the freight train, but the conductor, of his own motion, first suggested to the appellee and the other stockmen that they had better alight at the point where they did alight. He was not answering a question addressed to him for information, but was himself making a suggestion, and extending an invitation, when no question had been addressed to him upon the subject about which he spoke. Hence we are of the opinion that the trial court committed no error in refusing to give the second of appellant's refused instructions. By the terms of that instruction the jury were told "that information by those in charge of a railroad freight train to a passenger of mature age, and accustomed

Instructions.

to railroad travel, that he might, or might more conveniently, for some purpose of his own, alight from a car on which he was then traveling, at a place known by such person to be not the usual place of alighting from such train, does not require such passenger to take the risk of leaving the car at such place, and is not negligence on the part of the company operating such train," etc. The instruction is erroneous in assuming that the statement made to the appellee and the other stockmen by the conductor was in the nature of information, instead of leaving it to the jury to determine whether or not such statement constituted an invitation to the appellee to do what the conductor suggested. Of this instruction the appellate court correctly says in its opinion: "The second was faulty in that it was unduly argumentative, in that it assumed to say that certain facts would not in law amount to proof of a negligent invitation to the plaintiff to alight." All that is material in the appellant's second instruction was given by the court in the sixth instruction asked by and given for the appellant. This sixth instruction told the jury "that it is incumbent upon the plaintiff, to sustain the sixth count of his declaration, to prove by a preponderance of the evidence in this case that the injury of which he complains in his declaration in this case was caused by reason of the fact that the defendant, by its servants, failed and neglected to keep the plaintiff free from unnecessary danger, and not to expose him to needless perils; and that the defendant, by its servants, invited him to get off the train upon which the plaintiff was riding just before he alighted from said train on the grounds of defendant, at a time and place of needless peril; and that the plaintiff, at the time he was injured, was himself then and there in the exercise of due care for his own personal safety; and that he was then and there injured in consequence of and as the necessary result of the negligence of the defendant's servants, and not as the result of the omission of the plaintiff to exercise that care for his personal safety that a reasonable man, under the circumstances that surrounded the plaintiff at the time he was injured, would and should have exercised, to avoid being injured by the train of the defendant."

3. The appellant, upon the trial below, asked the court to submit to the jury certain special interrogatories. The court refused to submit to the jury some of these interrogatories, and modified others of them, which, upon being modified, the appellant withdrew. It is urged that this action of the court was erroneous. By

Special Interrogatories.

these interrogatories the jury were called upon to make special findings as to mere evidentiary facts. For instance, by one of the questions the jury were asked whether the plaintiff alighted, at the time he did, for the purpose of having more time to get lunch before his train should be made up; by another, the jury were asked to find whether or not the plaintiff was struck by any part of the engine of the passenger train; and, by another, the jury were asked to find whether or not the bell of the passenger train was rung continuously between Chestnut and Washington streets, in Bloomington. The material questions of fact authorized to be submitted to the jury under the statute upon that subject are not such as relate to mere evidentiary facts, but they are restricted to those elementary facts upon which the rights of the parties ultimately depend. As the special findings here called for merely related to evidentiary facts, there was no error in refusing to submit them to the jury. Railway Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

Some other points of minor importance are made by counsel for appellant, but, after considering them, we do not deem it necessary to discuss them. What has already been said disposes of the principal objections made to the judgments of the lower courts. Accordingly, the judgment of the appellate court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

BOGGS, J., having heard this case in the appellate court, took no part in its decision here.

NOTES.

Actions for Personal Injuries—Effect of Proof of Excessive Speed—Whether Negligence Per Se.—See Sutherland *v.* Cleveland, C., C. & St. L. Ry. Co. (Ind., 1897), 8 Am. & Eng. R. Cas., N. S., 425, and *note*, 428 *et seq.*

Same—Same—at Country Crossings.—See Sutton *v.* Chicago, St. P., M. & O. Ry. Co. (Wis., 1898), 10 Am. & Eng. R. Cas., N. S., 100, and *note*, 106.

Same—Same—Does not Excuse Contributory Negligence.—See Pletcher *v.* Scranton Traction Co. (Penn., 1898), 10 Am. & Eng. R. Cas., N. S., 715, and *note*, 717 *et seq.*

Stockman Traveling on Drover's Pass a Passenger.—See Louisville & N. R. Co. *v.* Bell (Ky., 1896), 8 Am. & Eng. R. Cas., N. S. 413, and *note*, 419 *et seq.*

Passengers—When Relationship Terminates.—See Brunswick & W. R. Co. *v.* Moore, *ante*, and *note*.

TREZONA

v.

CHICAGO G. W. RY. CO.

(*Supreme Court of Iowa, Dec. 16, 1898.*)

Limited Tickets.*—As between the passenger and the conductor, the ticket is conclusive evidence of the passenger's rights; and a ticket bearing on its face, in red ink, the words "Not good after date of sale," does not entitle the holder, after such date, to transportation.

Instructions.—The question whether the limitation on the ticket was waived by the act of the conductor in taking up the ticket and demanding fare not having been raised by the pleadings, it was error to instruct in regard thereto.

Trespassers—Ejection.—A person who presents to the conductor, a ticket void on its face and refuses to pay fare upon demand, is a trespasser on the train, and there can be no recovery for his ejection.

Expired Ticket—Recovery of Purchase Money.—The holder of a railroad ticket failing to use it during its life, is not entitled to have the purchase price refunded.

APPEAL by defendant from Delaware county district court. *Reversed.*

Plaintiff after presenting to the conductor a ticket bearing on its face in red ink the words, "Not good after date of sale" about thirteen months after its purchase, was forcibly ejected from defendant's train at the next station, and was only permitted to re-enter the car on payment of the regular fare, with 10 cents extra. This action was brought for damages for such ejection.

Case Stated.

D. W. Lawyer, *D. E. Lyon*, and *D. J. Lenehan*, for appellant.

Dunham, *Norris & Stiles*, for appellee.

*See *note*, 11 Am. & Eng. R. Cas., N. S., 216 *et seq.*; Boyd *v.* Spencer *et al.* (Ga.), 11 Am. & Eng. R. Cas., N. S., 247, and *notes* p. 250; McGhee *et al. v.* Reynolds (Ala.), 10 Am. & Eng. R. Cas., N. S., 49.

GRANGER, J. 1. It does not appear why the ticket was not used on the day of its purchase, nor does it appear that plaintiff did, on the day of the purchase, notice the limitation on the ticket, but he did know of it before he took the train on the 17th day of November, 1894. He says he had such knowledge, but thought the provision was unreasonable, and that, as he had paid for the passage, he had a right to it, notwithstanding the provision on the ticket. The arguments in this case take a wider range than the controlling legal proposition requires. A few significant facts, first stated, will do much towards clearing the way to the particular question that controls the case. Plaintiff had no ticket that purported to entitle him to a ride on the train from which he was ejected. It expressed on its face that he had no such right. The ticket contained the only evidence of the understanding under which it issued. Hence the conclusion is manifest and certain that the plaintiff was attempting to ride on a train for which he had no ticket, and for which neither he nor the company understood the ticket to be good. He expressly says that he knew of the limitation as to time for its use, but thought it was unreasonable. His evidence shows that he thought he was entitled to the ride "without any reference to the ticket"; that he was entitled to the ride, because he had paid for it. The arguments deal quite elaborately with the question whether such a limitation on a ticket is legal, the thought being that it is so unreasonable as to be against public policy. We do not think such a question is involved. It is not like a case where a ticket is apparently good on its face, as, where it is silent as to the time in which it may be used, and some rule or custom of the company limits its validity to a certain period, so that the purchaser has what he understands to be good, and what on its face appears to be so. The question that controls this case is not, did the company, because of the payment at one time of a fare, owe plaintiff a passage to Lamont, but did he present to the conductor a ticket that entitled him to such a passage? It is not sufficient that he was entitled to a passage, but he must obtain it in the way provided by the regulations of the company, that are sustained by the law of the land. In Ellsworth *v.* Railway Co., 95 Iowa, 101, 63 N. W. 584, we considered a question quite akin to this, except that we there dealt with the obligations of the company when a ticket, good on its face, was presented, and a rule of the company made it void. We there collated some authorities, and quoted somewhat from the dis-

cussions bearing on the rights of passengers with and without tickets entitling them to transportation on particular trains. Speaking to the question of a proper remedy, we said, in the Ellsworth Case, that in determining such a question we should keep in mind the difficulties to be met with and overcome in a successful management of the railway passenger traffic of the country, both as to the public and the carriers; and that to such an end it was clearly important that there should be rules for the guidance of the employees in the different parts of the service; and that such rules should be conclusive as to their course of conduct, even though at times the rule might operate to the prejudice of an individual passenger. As a conclusion of our discussion in that case, we said: "It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor." That language was used in considering what character of a ticket a conductor might or might not refuse, which question was directly involved in the case. The statement is followed by a reference to cases on both sides of the proposition, being, as we there stated, not harmonious. This question, on principle, was to some extent involved and settled in Stone *v.* Railway Co., 47 Iowa, 82. In that case there was a coupon ticket from Clinton to Sioux City, Iowa, the coupon first used being from Clinton to Missouri Valley. The conductor, out from Clinton, punched the coupon to Boone, Iowa, and returned it to the passenger. A conductor's check told him he must get a special check to stop over. At Marshalltown he left the train without a special check, and resumed his journey on the train the next day, and to that conductor he presented his ticket punched, and his conductor's check. These, properly read, showed him not entitled to transportation on that train to Boone, although he had paid his fare, and had not passed over that part of the route. It is true that that case turns largely on the fact that by leaving the train in violation of the regulations known to him his contract was at an end, so that he was not entitled to transportation until a new contract was made. The same is to be said in this case. By not using the ticket within the time fixed by it, his rights under the ticket were at an end, and, before he could rightfully claim a passage, he must obtain a ticket entitling him to one. For that purpose he should apply to the agent of the company authorized to issue

tickets, and there urge his claim, if such he had, to a ticket, because of his former payment, and not attempt its adjustment with the conductor, whose duty it was to take up and cancel, and not to issue, tickets. Had he not presented the ticket, but claimed a passage, because, more than a year before, he had purchased one, and had not used it, we assume no one would contend that he was entitled to a passage, and why? Because public policy, as well as public sentiment, would condemn a rule so palpably unreasonable. How do the cases differ? In the case assumed, the conductor may deny the passage, because he is not required to accept the word of the passenger, even though it is true. In the case at bar he presents a ticket that on its face negatives his right to a passage. In Bradshaw *v.* Railroad Co., 135 Mass. 407, it is said: "It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under this contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." See, also, McKay *v.* Railway Co., 34 W. Va. 65, 11 S. E. 737, and other cases there cited, where the rule is announced that: "As between the passenger and the conductor, the ticket is the conclusive evidence of the passenger's rights." Appellee concedes the right of the company to limit the life of a ticket, but insists that the limit must be reasonable. This ticket was held for 13 months before there was an attempt to use it, and, without determining the question of the limitation being unreasonable, it is to be said that the limitation expressed in no way operated to the prejudice of the plaintiff.

Limited Tickets.

2. In this case the conductor took up the ticket, and then demanded the fare, and reliance is placed on that fact as being a waiver of the limitation, and the court instructed that the limitation on the ticket was reasonable, but that, if the company took up the same within the statute of limitations, then the passenger was entitled to ride thereon. Error is assigned on the instruction, and we dispose of the point on this theory: that the case presents no

Instructions.

issue of waiver. The defendant pleaded the limitation of the ticket as a defense. If plaintiff relied on a waiver of the condition it must have been pleaded. Eiseman *v.* Insurance Co., 74 Iowa, 11, 36 N. W. 780, and numerous cases there cited. The invalidity of the ticket, after October 13, 1893, is pleaded in the answer, and, if plaintiff desired to show a waiver of the conditions, he must, under the authorities, have pleaded it in a reply, and no reply was filed; nor does such a plea appear in the pleadings filed. It was error to instruct on the question.

3. The court gave the following instructions: "(7) You are further instructed that a railroad company has a right to make a rule that upon the issuing of every first-class ticket the use of the same is limited to the day and trip for which the ticket was purchased, and such a rule is in law reasonable. (8) But in making such a rule as is named in the last instruction, they have no right to make one that would render the ticket absolutely void, and of no value, after the date and trip for which the ticket is issued; and such a rule, you are instructed, would be unreasonable. (9) You are further instructed that a first-class railroad ticket, when purchased, and its value limited to the day of sale and trip for which it was sold, and it is not used within that limit, does not entitle the owner, as a matter of right, to transportation after that time, but it is, nevertheless, of value to the holder during the statute of limitation, and the value of such ticket, in the absense of any other proof, is in law presumed to be the amount the purchaser paid therefor. (10) You are further instructed that a railroad company has a right to make a rule and direct its conductors to refuse to honor a ticket after the day and trip for which it was issued; and, if a conductor does do so, and collects fare from the passenger, he is in the line of his duty; and, if the passenger refuses to pay said fare on demand,then the conductor has a right to remove him from the train unless he pays full fare between the points of his travel, with ten cents added, using no more force than is necessary therefor." Exceptions were taken to those numbered 8, 9, and 10. The seventh instruction is not questioned, and must stand as the law of the case. It holds, as a matter of law, that the limitation on the ticket was reasonable, in so far as a right of passage was concerned, and, with the question of waiver out of the case, there could be no recovery for the ejection from the train, for the plaintiff refused to pay his fare, and held no ticket that

Trespassers—Ejection.

gave him a right of passage, and hence he was not a passenger, but a trespasser. See Stone *v.* Railway Co., *supra*. The instructions hold, as a matter of law, that, notwithstanding the limitation was reasonable, the plaintiff might recover back the amount paid for it; that is, they hold that it would be unreasonable to make the ticket valueless if not used, and that its value would be the amount paid for it, in the absence of proof to the contrary. This must mean that the holder of a railroad ticket, who does not use it for a passage during its life for such a purpose, is entitled, as a matter of law, to have the purchase price refunded. No authority is cited to support such a rule, and we do not believe it is the law. It contravenes all general principles on the law of contracts. The contract of carriage imposed on the company an obligation to be prepared to perform the contract on its part by the equipment and operation of its train, and we do not see why, when the ticket was purchased so that the company was bound by its terms, the plaintiff was not alike bound; that is, he must accept what he has purchased, or lose it. This question received but a passing notice in argument, and we leave it without further elaboration. The judgment must be reversed.

Expired Ticket—Recovery of Purchase Money.

ALABAMA G. S. RY. CO.

v.

COGGINS.

(*Circuit Court of Appeals, Sixth Circuit, July 5, 1898.*)

Leaving Car Temporarily*—Care Due by Company.—Where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, to exercise or to transact business, or to accomplish any other reasonable or useful object, he does not cease to be a passenger, and is still entitled to the highest degree of care from the company.

Same—Contributory Negligence—Question for Jury.—Where the evidence is conflicting as to whether the passenger rightfully left

*See notes at end of case.

the car, and as to whether he subsequently loitered between the tracks, where he was struck by the cars, an issue is made for the jury.

Comparative Negligence—Apportionment of Damages.*—Under the laws of Georgia, if the negligence of the passenger and the company is concurrent and contributes to the injury, plaintiff may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to him; therefore it was proper to refuse to charge that a passenger exposing himself to danger cannot recover unless he shows by a preponderance of evidence that the trainmen were guilty of wanton negligence.

Question for Jury.—When a passenger is proceeding in the usual way from the train to the station, he has a right to assume that the company will not expose him to danger without full warning; and though this does not relieve him from the duty of exercising ordinary care in a yard where trains are moving about, it should be left to the jury to say whether it did not justify him in assuming that a train on a main track would not suddenly be switched across the only practicable path open to him in reaching the station, without some special warning.

ERROR by defendant to the Circuit Court of the United States for the Eastern District of Tennessee. *Affirmed.*

Wm. L. Frierson, for plaintiff in error,
Champe S. Andrews, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is a writ of error to reverse the judgment for the plaintiff below in an action for damages for a personal injury inflicted in Georgia. The plaintiff, Coggins, was a lineman or telegraph repairer in the employ of the Western Union Telegraph Company. His wages were $50 a month, and his expenses. He was furnished by his employer with an annual pass over the defendant's road. Upon what consideration this annual pass was issued by the railroad company to the telegraph company did not appear in the evidence. The contract was called for by plaintiff's counsel, and was not produced. The court charged the jury that the rights of Coggins were the same as if he had paid his fare, and this, though excepted to,

Case Stated.

*See notes at end of case.

is not assigned for error. The evidence for the plaintiff tended to show the following state of facts: Coggins was directed by his superior to take passage on this train, which was a freight train carrying passengers, for Crudup, where the telegraph line needed repair. At Rising Fawn, Ga., an intermediate station, the train stopped to do some switching. The caboose in which Coggins was riding stopped about 1,500 feet from the station. This was the usual place for passengers by freight trains to alight. The only practicable way of reaching the station fron this point was to walk between the main track and the house or scale track, which lay parallel to the main track on the right. Coggins had inquired of the brakeman how long the train would remain at Rising Fawn, and, on being told that its stay would be half an hour in length, alighted from the caboose, and walked between the tracks towards the station, to inquire whether there were any telegraph messages to him from his superior. It was customary for his superior, when he was out on the line, to telegraph orders to points where his train was likely to stop. As Coggins walked towards the station, he saw part of the train upon which he had come backing towards him on the main track. As it approached, he concluded it would be safer to cross over near to the house or scale track, lying parallel. A cut-off or switch track crossing diagonally from the main track to the house track lay just in front of him, and at his side. He crossed this, towards the scale track. His left side was now towards the approaching train. As he stepped over the second rail of the cut-off track, he heard a brakeman on the ground back of him calling in a loud voice to another brakeman on the approaching train. To see the cause of the calling, he turned half round towards the right, just as he reached the end of the ties of the cut-off track. As he did so, the cars, which, instead of continuing on the main track, as he expected, had been switched on to the cut off track struck his right shoulder, whirled him about, and threw him on his back, with his left arm under the wheels. He was more or less familiar with the yard at Rising Fawn, and the brakeman engaged in switching the train had told him that they were about to switch a number of cars on to the furnace tracks, which lay to the east of the main track, and on the side opposite to the house or scale track. Hence he did not anticipate that the train, as it approached would be switched over on the house track cut-off. Both the brakemen engaged in switching the train were where they could have seen Coggins had they looked; and one did

see him, but was made so speechless at the sight of his danger as not to give him warning, and the other one, who was on the rear end of the backing train, did call, but not until it was too late for Coggins to escape. This is the case for the plaintiff.

The defendant introduced evidence to show that the accident occurred 15 or 20 minutes after the train stopped at Rising Fawn; that Coggins was loitering along between the tracks, talking with acquaintances whom he met there; that he had no ground to anticipate the receipt of telegraphic orders at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. Counsel for the railroad company excepted to that part of the charge of the court in which, after explaining the high degree of care a railroad company owes to its passengers, the court submitted to the jury as an issue of fact whether Coggins was to be regarded as a pasenger when he was injured. Upon this point the court said:

"Now, then, when the company undertook to carry him on this freight car so long and while he was a passenger, the company owed to him the highest degree of care for his protection, for his safety, as it did to any other passenger; provided, of course, that a passenger who takes or undertakes to ride on a freight car understands there is a difference between that and a passenger car, that it is managed differently, that the appliances are different, that its conveniences are different; and, of course, it is only the exercise of that high degree of care such as it might practically exercise with a freight train as distinguished from a passenger train. The increased danger of riding on a freight train as compared with a passenger train the passenger undertook himself, and the company was required to exercise care of the highest character in the management of a freight train, but not of the same degree it would be bound to do in a passenger train.

"Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger, and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable

prudence to do so, attend to his business (if he had any), and return, and no longer. The liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return, after transacting his business, and did not extend to him after the lapse of that time.

After that they owed him no duty, except that which they owed to any stranger,— not to wantonly or unnecessarily injure him.

"Now then, coming back after the train stopped: If they stopped that train at the place where it was usual for passengers to get out and alight from a train whose point of destination was there, where it was usual for passengers to get out and go to the depot on proper business, and this man Coggins got out and went along on his business, as an ordinarily prudent man would do, and was on his way to the depot, the company owed him that degree of care that it owes to its passengers not to hurt him, and so operate its trains as that during the time necessary for him to get out and back, that they would not strike him on his way, provided he was moving along the usual way of going to the depot; and if the company failed to exercise that degree of care, and he was struck and injured, it would be liable for the accident. Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot; and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employees in the yard,—if he stopped in the yard, and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that), —why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switch yard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe to a stranger in the yard without any business." The foregoing states the law correctly, and leaves to the jury the issue in such a way as to

enable them, without difficulty, justly to determine whether Coggins was entitled to the high degree of care from the railroad company due a passenger when he was struck. The Georgia Code (section 2067) provides that: "A carrier of passengers is bound to extraordinary diligence on behalf of himself and agents to protect the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence."

As the accident happened in Georgia, this section furnishes the law of the present case. Railroad Co. *v.* Ihlenberg, 43 U. S. App. 726, 21 C. C. A. 546, and 75 Fed. 873.

Leaving Car Temporarily—Care Due by Company.

But the section is only declaratory of the common law, and the question when one who has been a passenger ceases to be such must still be determined by the common law. It is well settled that the obligation of a common carrier of passengers continues so long as they conform to the reasonable regulations of the carrier; not only while they are on the cars or other vehicle of transportation, but also while they are on the carrier's premises for the purpose of the journey in going to or coming from the means of conveyance. Gaynor *v.* Railway Co., 100 Mass. 208; Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* Railroad Co., 84 N. Y. 241; Klein *v.* Jewett, 26 N. J. Eq. 474, affirmed in 27 N. J. Eq. 550; and Baltimore & O. R. Co. *v.* State, 60 Md. 449, 463. The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations, and go to the station house while the train is waiting. But we think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose like that of refreshment, or the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety. The question is fully considered in a most satisfactory opinion in Dodge *v.* Steamship Co., 148 Mass. 207, 19 N. E. 373; in which the conclusion just stated is announced, and is fortified by many authorities. Other cases in which the same view is taken are McKimble *v.* Railroad Co., 141 Mass. 463, 470, 5 N. E. 804; Parsons *v.* Railroad Co., 113 N. Y.

362, 363, 21 N. E. 145; Packet Co. *v.* True, 88 Ill. 612; Dice *v.* Locks Co., 8 Or. 60; Railroad Co. *v.* Riley, 39 Ind. 568; Railroad Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108; Clussman *v.* Railroad Co., 9 Hun, 618, approved 73 N. Y. 606; and Hrebrik *v.* Carr, 29 Fed. 298, 300. There is nothing in the case of Railroad Co. *v.* Thompson, 76 Ga. 776, which in any way conflicts with these cases. There are two cases in which the contrary view is announced, though the facts of each case were such that it would seem to have been unnecessary to the decision. State *v.* Grand Trunk R. Co., 58 Me. 176; DeKay *v.* Railway Co., 41 Minn. 178, 43 N. W. 182.

In the case at bar it was well established that the point at which the caboose of the freight train stopped was more than 1,500 feet from the station; that this was the usual point for the alighting of passengers from that train; and that the only practicable way to reach the station house from there was to walk between the train track and the house track, as the plaintiff did. It was in evidence that he had reason to expect to find a telegram for him at the station, and that he went directly there to get it. If this was true, he was a passenger, and had a right to rely on the company's exercising a high degree of care not to run him down. His evidence was contradicted, and the testimony of the railroad company tended to show that he loitered between the tracks, and had no business at the station. That made an issue for the jury, which the court left to them under proper instructions.

Same—Contributory Negligence—Question for Jury.

Another exception by defendant was based on the refusal of the court to give a charge in the words following:

"If the plaintiff was himself at fault in having exposed himself to the danger of being hit by a moving car, he cannot recover at all, unless he has shown by a preponderance of the evidence that the servants of the defendant were guilty of such negligence as would amount to wantonness."

The legislature of Georgia has enacted laws defining the cases in which liability for negligence arises. They are as follows:

Code, § 2972: "If the plaintiff by ordinary care could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

Section 2067: "A carrier of passengers is bound to extraordinary diligence on behalf of himself and agents to protect

the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence."

Section 3033: "A railroad company shall be liable for any damage done to persons, stock or other property, by running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Section 3034: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

Sections 2972 and 3034, when read together, introduce a variation from the common law in one respect only. They declare, first, that a plaintiff shall not recover when the accident is caused by his own negligence. They further declare that, even if the defendant was negligent in such a way as to cause the injury, the plaintiff shall not recover if, with the defendant's negligence as an existing condition of the situation, he could have avoided its consequences by ordinary care. So far these rules are the same as those established at the common law. Coasting Co. *v.* Tolson, 139 U. S. 556, 11 Sup. Ct. 653. Finally, however, they provide that, when the negligence of both parties is concurrent and contributes to the injury, then the plaintiff shall not, as at common law, be barred entirely, but may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to him. The decisions of the Georgia court in construing these sections have not always been as clear and as intelligible as might be desired; but the foregoing coincides with the construction which has been put upon them by that court in the latest and earliest cases, which have been called to our attention. Railroad Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105; Railroad Co. *v.* Johnson, 38 Ga. 409, 433. In the case at bar, if the plaintiff was negligent, it was in stepping upon the cut-off track in the face of an approaching train, on the assumption that the train was about to pass him on the main track. If the defendant was negligent, it was in

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failing to warn the plaintiff, a passenger, that the train was to be switched off onto the cut-off. If the jury were to find both parties thus negligent, their negligence would be concurrent, and the damages must be apportioned. The case was not one where the negligence of defendant had begun, or was actually existing as a condition of the situation when the plaintiff's want of due care intervened, but the want of due care on the part of both was concurrent. Hence the charge asked was not applicable to the case.

Finally, it is assigned for error that the court refused to direct a verdict for the defendant as requested. In this the court was clearly right. If the plaintiff was a passenger at the time of the accident, as the jury might have found from the evidence, then the same rules for determining the existence of contributory negligence on his part do not apply as if he were a traveler at a railway crossing. Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* Railroad Co., 84 N. Y. 241; Klein *v.* Jewett, 26 N. J. Eq. 474. When a passenger is proceeding in the usual way from the train to the station, he has a right to assume that the company will not expose him to danger without full warning; and, though this does not relieve him from the duty of exercising ordinary care in a yard where trains are moving about, it might well be left to a jury to say whether it did not justify him in assuming that a train on a main track would not suddenly be switched across the only practicable path open to him in reaching the station, without some special warning. The judgment of the circuit court is affirmed, with costs.

Question for Jury.

NOTES.

Passengers Alighting at Intermediate Stations.—A passenger does not necessarily lose his character as such by merely alighting at a regular station, though he has not yet arrived at the terminus of his journey. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258; Parsons *v.* New York Cent.. etc., R. Co., 39 Am. & Eng. R. Cas. 469, 113 N. Y. 355, *affirming* 48 Hun (N. Y.) 615, 15 N. Y. St. Rep. 1016.

In this case it appeared that, after the train upon which plaintiff's testator was a passenger had stopped at a station, testator alighted and attempted to cross one of defendant's tracks at such station intending to return to the train and resume his journey. When he had reached a point about ten feet from the passenger train he was struck by the engine of a freight train which was backing down at a speed forbidden by the rules of the defendant company. It did

not appear for what purpose the deceased had left the train, but it was said that he sometimes got off and communicated with relatives or friends who lived next the station yard. The whole transaction occurred in front of the station house and within the station yard on ground upon which passengers were accustomed to pass and repass in going and coming to the trains. The time the injury occurred the engineer of the passenger train was exhausting its steam and making a loud noise. *Held*, that, under the circumstances the plaintiff was entitled to recover.

Contra.—But in De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 39 Am. & Eng. R. Cas. 463, it is held that where a passenger enters a train and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station he, for the time being, surrenders his place as a passenger and takes upon himself the responsibility of his own movements; but if he leaves without objection on part of the company, he does no illegal act and has a right to re-enter and resume his journey.

At Refreshment and Eating Stations.—A passenger on a steamboat may properly go ashore at a landing to get a meal, and he remains a passenger during his egress from the boat. Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541, 37 Am. & Eng. R. Cas. 67. And the rule holds good towards a passenger who, while on a continuous journey, is going to and returning from the eating stations provided by the company for the accommodation of passengers. Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 58 Am. & Eng. R. Cas. 360. It is not necessary that a person should be on the train in order to be regarded as a passenger. As a passenger he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street alongside of the tracks and platforms. Jeffersonville, etc., R. Co. *v.* Riley, 39 Ind. 568, 10 Am. Ry. Rep. 325.

At Stops to Allow Other Trains to Pass.—And when a train turns out upon a side track, at an intermediate station, and there stops to await the crossing of another train out of time, and a passenger not destined to that station, without objection made or notice given leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger. State *v.* Grand Trunk R. Co., 58 Me. 176. Also Wandell *v.* Corbin (Supreme Ct.) 17 N. Y. St. Rep. 718, 1 N. Y. Supp. 795; De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 39 Am. & Eng. R. Cas. 463.

Comparative Negligence.—See Southern Ry. Co. *v.* Watson, 11 Am. & Eng. R. Cas., N. S., 839, and extensive *note*, p. 842.

POMEROY

v.

BOSTON & M. R. R.

(*Supreme Judicial Court of Massachusetts, Oct. 20, 1898.*)

Injury to Passenger while Alighting—Negligence—Instructions.—Plaintiff alleged, and there was evidence to show, that defendant's car was moved, or was permitted to move, suddenly, while plaintiff, a passenger, was alighting. *Held*, that it was not error to refuse rulings separately exonerating individual members of a group of defendant's employees, it not having been necessary for plaintiff to show which of such employees was responsible for such negligence.

Same.—In such action, there was evidence tending to show that the movement of the car was caused by letting off the air in the brake in the usual way; and the jury were instructed that if there was no way to avoid letting the air off in the way it was let off, if the way adopted was the usual and proper way, it would not be carelessness. *Held*, that defendant was not entitled to a broader ruling on the subject.

Testimony—Object of Introduction—Instruction.—Testimony was admitted tending to show that plaintiff's parents had told a different story out of court. *Held*, that defendant was not prejudiced by the court's caution to the jury, that the parents' statements were not evidence of the facts stated, but were "used simply to affect the testimony of those parties," it not appearing that it was introduced for any other purpose.

EXCEPTIONS by defendant from Hampden county superior court. *Overruled.*

A. L. Green, for plaintiff.

Brooks & Hamilton, for defendant.

HOLMES, J. This is an action for personal injuries alleged to have been caused by negligently permitting a car to move suddenly while the plaintiff, a passenger, was alighting from it at a station. At the trial there was evidence that the car moved as alleged, but it did not appear who made it move. Of course, the jury, if they be- Case Stated.

lieved the story, were at liberty to find that some servant of the company was the cause, probably the brakeman, the conductor, or the engineer. The defendant tried to break the force of this inference by asking successive instructions that, upon the pleadings and evidence there could be no recovery by reason of negligence on the part of any one of these persons. As there was no question on the pleadings, this meant, so far as it was not misleading in form, that there was no evidence that the brakeman had been negligent, or the conductor, or the engineer. The judge refused to give the instructions asked and the defendant excepted.

The refusal was clearly right. There was evidence that the injury was caused by some one of the servants described. It was not necessary for the plaintiff to go further, and prove from whose hand the injury came. See Mooney *v.* Lumber Co., 154 Mass. 407, 28 N. E. 352. If she showed that the responsibility rested upon one of a group, that being all that she needed to show, rulings exonerating each member of the group successively would be wrong, either on the ground that evidence against the group was some evidence against each member of it, or else upon the ground that they were irrelevant to the evidence offered. This is another attempt to break the sticks of a fagot separately, although of a different kind from that just dealt with in Collins *v.* Inhabitants of Greenfield, 171 Mass.—,51 N. E. 454.

Injury to Passenger while Alighting—Negligence—Instructions.

The plaintiff testified that the car moved a foot and a half, and there was some evidence tending to show that the motion was caused by letting off the air in the brake in the usual way. The defendant asked a ruling that, if the injury was due to this cause, the plaintiff could not recover. However improbable this account may seem, if the jury found that the defendant let off the air at such a time and in such a way as to throw down a passenger leaving its car and using due care, then, subject to the instructions which were given, they might hold the defendant liable for the result. The judge instructed the jury that if there was no way to avoid letting the air off in the way in which it was let off, if the way adopted was the usual and proper way, it would not be carelessness. The request for a broader ruling that there could be no recovery because of any motion imparted to the car by letting off the air brakes is answered by what we have said. The instructions by the judge upon the same point seem to require no special comment.

Same.

Some testimony was put in tending to show that the plaintiff's parents had told a different story out of court. The judge cautioned the jury that the parents' statements were not evidence of the facts stated, but were "used simply to affect the testimony of those parties." This was excepted to, and now it is suggested that a part of the testimony referred to by the judge (not all) was the conversations of the mother in presence of the child, and that the failure of the child to correct her mother might be found to have been an admission. The form in which the testimony was put suggested only contradiction of the mother, as nothing was asked or stated concerning the conduct of the child at the interview, and very naturally, it did not occur to the judge that any other use was to be made of it. If the counsel for the defendant had thought that he could deduce an admission from the supposed failure of a suffering child of nine or ten in its mother's arms, to correct her statement, he was bound to call the attention of the judge to it. Such an inference is not one which the evidence was calculated to suggest.

Testimony—Object of Introduction—Instruction.

We have dealt with all the exceptions which were argued. We notice no error elsewhere.

Exceptions overruled.

STROTHER *et ux.*

v.

ABERDEEN & A. R. CO.

(*Supreme Court of North Carolina, Nov. 9, 1898.*)

Passenger Insulted by Conductor—Action by Husband and Wife—Admissions of Husband.—In an action under the code of North Carolina, section 178, to recover damages for an insulting proposition made by defendant's conductor to a married woman, while she was a passenger on defendant's train, where the husband is only a formal party, it is error to admit, over plaintiff's objection, evidence as to admissions made by the husband prior to the commencement of the action; and where it appears from the amount of the verdict that plaintiff may have been prejudiced by its admission, such error is ground for a new trial.

Strother *v.* Aberdeen & A. R. Co

Damages—Instruction.*—It was not error to instruct that if the woman exposed herself to the insult by an immodest remark to the conductor, it might be considered in fixing the damages.

New Trials.—Where defendant does not appeal, and plaintiff appeals merely upon the the ground of the inadequacy of the damage given, a new trial of the cause should be confined to such issue.

APPEAL by plaintiffs from Guilford county superior court. *Reversed.*

J. T. Morehead, for appellants.
Douglass & Simms and *Shaw & Scales*, for appellee.

CLARK, J. This action was brought by the wife for a tort, —an insulting proposition made to her by the conductor of the defendant corporation, while a passenger on its train.

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The sufficiency of the cause of action is not controverted, for the defendant does not appeal, and besides, it is amply sustained by Daniel *v.* Railroad Co., 117 N. C. 592, 23 S. E. 327, especially authorities cited at page 608, 117 N. C., and page 329, 23 S. E., and Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

The plaintiff appeals for errors alleged as to the second issue,—the *quantum* of damages. The first exception is that the court admitted evidence, over the plaintiff's objection, of admissions or *quasi* admissions from the silence of the husband. The husband was not required to be made a party by Code, § 178. Shuler *v.* Millsaps, 71 N. C. 297. He has no interest or share in the recovery (Const. art. 10, § 6), and is only a formal party, and his prior admissions are not thereby made competent against the real party in interest. 2 Tayl. Ev. §§ 741, 742 ; 1 Greenl. Ev. 173. It is true that the husband, when joined as a necessary party, is *pro hac* vice agent of his wife, and she is bound by the acts of counsel selected by him, in the absence of collusion (Vick *v.* Pope, 81 N. C. 22) ; and therefore his admissions after action brought would be evidence against her ; but this is on the ground of agency, and not of his being a party to the record, and hence his admissions made, as in this case, before action brought, being before the agency began, are not admissible (Towles *v.* Fisher, 77 N. C. 437). There are many cases holding that the admission of irrelevant or even "incompetent evidence of slight importance is not ground for new

Passenger Insulted by Conductor—Action by Husband and Wife—Admissions by Husband.

*See note at end of case.

trial, unless it appear that the appellant has suffered prejudice by its admission." Glover *v.* Flowers, 101 N. C. 134, 7 S. E. 579 ; Patterson *v.* Wilson, 101 N. C. 594, 8 S. E. 341 ; State *v.* Shoemaker, 101 N. C. 690, 8 S. E. 332. But here the evidence erroneously admitted was prejudicial, being an offer of the conductor to pay $20, and the failure of the husband to promptly and indignantly reject it. All this was before suit brought, when in no sense was the husband (in the absence of evidence to that effect) the agent of the wife ; and the inference sought to be drawn is his *quasi* admission that it was not grossly inadequate. This evidence was not made competent by the husband's being afterwards made a formal party to the action.

The other exception—that the judge erred in instructing the jury that, if the woman opened the way by an immodest or improper remark to the conductor, it might be considered in fixing the damages—cannot be sustained. Such conduct on her part, if proved, did not justify the conduct of the conductor, but certainly she is not entitled to the same award of punitive damages as one who gave no license by imprudence in speech or conduct.

Damages—Instructions.

The only appeal being by the plaintiff upon exceptions applying to the verdict upon the second issue, the defendant not having appealed, this is clearly a case where the new trial should be confined to that issue. Silver Val. Min. Co. *v.* North Carolina Smelting Co., 122 N. C. 542, 29 S. E. 940; Rittenhouse *v.* Railroad Co., 120 N. C. 544, 26 S. E. 922; Nathan *v.* Railroad Co., 118 N. C. 1066, 24 S. E. 511; Pickett *v.* Railroad Co., 117 N. C. 616, 23 S. E. 264; Blackburn *v.* Insurance Co., 116 N. C. 821, 21 S. E. 922; Tillett *v.* Railroad Co., 115 N. C. 662, 20 S. E. 480; Jones *v.* Swepson, 94 N. C. 700; Boing *v.* Railroad Co., 91 N. C. 199; Price *v.* Deal, 90 N. C. 290; Jones *v.* Mial, 89 N. C. 89; Lindley *v.* Railroad Co., 88 N. C. 547; Crawford *v.* Manufacturing Co., *Id.* 554; Roberts *v.* Railroad Co., *Id.* 560; Allen *v.* Baker, 86 N. C. 91; Burton *v.* Railroad Co., 84 N. C. 192; Merony *v.* McIntyre, 82 N. C. 103; Holmes *v.* Godwin, 71 N. C. 306; Key *v.* Allen, 7 N. C. 523.

New Trials.

Error.

NOTE.

Damages—Evidence.—Where the jury are permitted to consider the motive or intent of the defendant in assessing damages, evidence of the lack of malice, the defendant's provocation, and the

intent with which the act complained of was done is always admissible. Gilliam *v.* Love, 30 Ga. 864; Avery *v.* Ray, 1 Mass. 12; Larned *v.* Buffinton, 3 Mass. 546, 3 Am. Dec. 185; Farr *v.* Rasco, 9 Mich. 353, 80 Am. Dec. 88; Huson *v.* Dale, 19 Mich. 17, 2 Am. Rep. 66; Allison *v.* Chandler, 11 Mich. 542; Kreiter *v.* Nichols, 28 Mich. 496; Ganssly *v.* Perkins, 30 Mich. 492; Welch *v.* Ware, 32 Mich. 77; Gilman *v.* Lowell, 8 Wend. (N. Y.) 573, 24 Am. Dec. 96; Bennett *v.* Smith, 21 Barb. (N. Y) 439; Buford *v.* M'Luny, 1 Nott & M. (S. Car.) 268.

And see Reuck *v.* McGregor, 32 N. J. L. 70; White *v.* Wyley, 17 Ala. 167; Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Linford *v.* Lake, 3 H. & N. 276; Skull *v.* Glenister, 33 L. J. C. P. 185.

SOWASH

v.

CONSOLIDATED TRACTION CO.

(Two Cases.)

(*Supreme Court of Pennsylvania, Nov. 14, 1898.*)

Inviting Passenger to Alight at Dangerous Place—Negligence.*—Defendant, a street-railway company, is liable for injuries to a passenger resulting from a fall upon broken ground, where she had been invited to alight, on a dark night, by the motorman, there being no proof of contributory negligence on her part.

APPEALS by defendant from Allegheny county court of common pleas. *Affirmed.*

Geo. C. Wilson, *Wm. D. Evans*, and *M. W. Acheson, Jr.*, for appellant.

David S. McCann and *J. L. Ritchey*, for appellees.

PER CURIAM. In the court below, these were two cases, consolidated into one, and tried at the same time and before the same jury, the plaintiffs being husband and wife. There was evidence that the motorman opened the front door of the car, and invited Mrs. Sowash to leave the car from the front platform. She testifies that she followed his direction, and

*See note at end of case.

descended to the ground from the steps of the front platform. The ground was broken, and the night was dark, and the plaintiff testifies that, within a very few steps, she caught her foot in some way, and fell to the ground, and sustained her injuries. As there was no proof of any contributory negligence on her part, if the jury believed her story, she was entitled to recover, and her husband also. The case must necessarily have been submitted to the jury, and could not have been taken from them without error. The judgments are affirmed.

NOTE.

Injury to Passenger Alighttng at Unsafe Place in Street—Company Not an Insurer.—See 8 Am. & Eng. R. Cas., N. S., *note*, 80.

A street-railroad company, having no control over the street, is not an insurer of the safety of any place at which it stops a car for passenger to alight. If the company exercises proper care in its selection of a place, it is not in legal fault if the place proves to be in fact unsafe. Conway *v.* Lewiston & Auburn Horse R. Co. (Me.), 2 Am. & Eng. R. Cas., N. S., 339.

GILLMAN

v.

FLORIDA CENT. & P. R. Co.

(*Supreme Court of South Carolina, Sept. 28, 1898.*)

Failure to Carry—Complaint—Exemplary Damages.*—A complaint claiming exemplary damages, and setting forth that defendant's conductor, after being informed by defendant's ticket agent that plaintiff had properly endeavored to obtain a ticket, and that plaintiff desired transportation in order to attend his sister's funeral, promised to hold the train until plaintiff could obtain a ticket and board the car, but failed to do so, and wrongfully, wantonly, and willfully caused the train to leave the station, though plaintiff returned immediately, thereby injuring plaintiff's feelings, and putting him to additional expense, sufficiently states a cause of action for exemplary damages.

Same—Evidence.—It was not reversible error to allow plaintiff to testify as to what he did after reaching his destination, the effect of this testimony being to aggravate, not the damages which plain-

*See note at end of case.

tiff sustained, but the damages which defendant would pay as punishment for the misconduct of its servants.

Same.—It was not error to allow plaintiff to say in answer to the question "How can you estimate your feelings in damages?" "No reasonable amount could have bought my privilege of being at home in such a case."

Same.—It was not error to refuse to allow the conductor to testify as to his uncommunicated thoughts at the time of such transaction.

New Trials—Review.—The action of a circuit court in refusing a new trial will not be reviewed either upon the ground of the insufficiency of the evidence, or of excessive damages.

APPEAL by defendant from Lexington county circuit court of common pleas. *Affirmed.*

The paragraphs of the complaint referred to in the opinion of the court are as follows:

"(2)That at Denmark, a station on the line of said railroad, now in Bamberg county, but then in Barnwell county, in the state aforesaid, at 3 o'clock on the morning of the 23d day of October, 1897, the plaintiff, on reaching the said station at Denmark, applied to the station agent of the defendant for a ticket to Richmond, Va., whereupon the said station agent informed the plaintiff that the train going to Columbia, S. C., was then approaching the station from Savannah, Ga.; that he would not have time to deliver him the ticket, but would check his baggage to Columbia; that he could pay the conductor of said train his fare to Columbia, S. C., at which place he could procure a ticket to Richmond, Va.

Case Stated.

"(3)That plaintiff then and there informed said station agent of the defendant that his sister was lying dead in the city of Richmond, Va., and that it was of the utmost importance for him to go on the train of the defendant, which was then approaching said station at Denmark.

"(4)That immediately upon the arrival of said train at said station the plaintiff boarded it, and deposited his sample case and grip sack in the first-class car of said train, and the said station agent, who had checked plaintiff's baggage, came to the platform of one of the cars of said train on which the conductor of said train of cars was standing, and informed said conductor, who was the agent and servant of the defendant, and acting within the scope of his authority as such agent and servant, that he had been unable to give the plaintiff a ticket, but had checked his baggage to Columbia

and that plaintiff would pay said conductor his fare to Columbia; and being informed that plaintiff was on his way to Richmond, Va., and how important it was for plaintiff to go on said train of cars in order to reach Richmond at the earliest possible moment, the said conductor then and there directed the said station agent to sell plaintiff a ticket to Richmond, saying that said train was on time, that he was in charge of it, and would hold it there until plaintiff could go with said station agent to the office, get the ticket, and get on said train.

"(5) That under the direction and instruction of said conductor, who was in charge of said train of cars as agent and servant as aforesaid, this plaintiff got off of said cars, and went to the office of said station agent, and procured a ticket to Richmond, Va., paying said station agent the sum of $13.45 for the same, and immediately returned to the place where the train was standing when he left it.

"(6) That, before the plaintiff could procure said ticket and return to the place where he left said train of cars, the said conductor of said train of cars, being the agent and servant of the defendant, and acting within the scope of his authority as such agent and servant, wrongfully, wantonly, and willfully caused said train of cars to leave said station for Columbia, S. C., at a rapid rate, carrying away plaintiff's baggage, sample case, and grip sack, and left plaintiff at said station, without any provocation whatsoever.

"(7) That by reason of the wanton and willful conduct of the agent and servant of the defendant, as is hereinbefore set forth , and in getting this plaintiff off said train and leaving him as aforesaid, this plaintiff was delayed, greatly inconvenienced, and humiliated, was insulted, and his feelings injured, was subjected to further expense in trying to reach Richmond, and was otherwise injured, to his damage nineteen hundred dollars."

C. J. C. Hutson and *Wm. H. Lyles*, for appellant.

George Tillman Graham and *Patrick Henry Nelson*, for respondent.

McIver, C. J. Inasmuch as the first question raised by this appeal is whether there was error in overruling the demurrer interposed upon the ground that the facts stated in the complaint are not sufficient to constitute a cause of action, it will be necessary for the reporter to set forth in his report a copy of so much of the complaint as states facts of the case,

Failure to Carry—Complaint—Exemplary Damages.

to wit, paragraphs 2, 3, 4, 5, 6, and 7. If the facts there alleged be true,—and they must be taken to be so, in considering the sufficiency of the demurrer,—it seems to us that the case of Samuels *v.* Railroad Co., 35 S. C. 493, 14 S. E. 943, conclusively shows that the facts there alleged are quite sufficient to sustain the plaintiff's cause of action for exemplary damages; and it seems that both parties, as well as the trial judge, treated the case as an action for the recovery of exemplary damages only. There can be no doubt that when a railroad company receives a charter from this state, or even when it has been chartered by another state, and allowed to exercise its corporate franchises within the limits of this state, it assumes certain duties to the public, accompanied with correlative rights on the part of the public, which duties it is legally bound to perform on the one hand, and to recognize those rights on the other. When such a corporation assumes the position of a carrier of passengers within this state, as the defendant corporation is conceded to have done, it assumes, among other duties, the obligation to receive and carry safely and promptly all persons offering themselves for transportation to and from the various stations along the line of its road; and when the plaintiff offered himself as a passenger from Denmark, one of defendant's stations, to be carried to Columbia, the terminus of defendant's road, and thence to Richmond, Va., by connecting lines, he had a right to be received as a passenger, and afforded every necessary and proper facility for reaching his destination comfortably, safely and promptly, provided he complied with the reasonable regulations of the company for that purpose; and he also had a right to ask for and obtain from the officers and agents of the defendant company all necessary information to enable him to accomplish his purpose. If, therefore, the plaintiff was deprived of, or hindered in obtaining, the enjoyment of his legal right by the willful default of the officers or agents of the company intrusted with the performance of the duties resting upon the company, or by their wanton or reckless disregard of the rights of the plaintiff, he certainly would have a cause of action against the company, not only to recover damages for any pecuniary loss he might thereby sustain, but also for exemplary damages, as a punishment for such willful and wanton disregard of plaintiff's legal rights. Inasmuch as plaintiff is not suing for any consequential or special damages, the absence of any allegation in the complaint of any such damages cannot af-

fect the question; the claim being for exemplary damages which arose immediately out of the alleged misconduct of defendant's officers and agents.

The demurrer having been overruled,—properly as we have seen,—testimony was introduced by both parties, no motion for a nonsuit having been made, and the case was submitted to the jury under the charge of the circuit, and a verdict was rendered in favor of plaintiff for the sum of $1,500. Thereupon the defendant moved, on the minutes, for a new trial (1) because there was no evidence which would justify the jury in rendering a verdict for punitive damages; (2) because the damages awarded by the jury were excessive. This motion having been refused, and judgment entered upon the verdict, the defendant appeals upon the several grounds set out in the record.

The first two grounds, imputing error to the circuit judge in overruling the demurrer, having already been disposed of, need not be further considered.

The third ground complains of error in allowing the plaintiff to testify as to what he did after he got back to Richmond. This, it seems to us, was harmless error, if error at all. At most, its only effect would be to aggravate, not the damages which plaintiff sustained, but the damages which defendant would pay by reason of the misconduct of its servants, as a punishment for their willful or wanton default, and in that view it would be competent. Same—Evidence.

The fourth ground imputes error to the circuit judge in allowing plaintiff to say, in answer to the question, "How can you estimate your feelings in damages?" "No reasonable amount could have bought my privilege of being at home in such a case." We do not see any error in this. He did not undertake to say how much he estimated his damages at. Indeed, his answer showed that he could not make any estimate of the amount. Same.

The fifth and sixth grounds impute error in not allowing the witness Brock, who seems to have been the conductor of the train which plaintiff desired to take, to say what he thought or supposed. There was, clearly, no error in this. The witness was allowed to say what he said and did, and certainly what was in his own mind, and not communicated to any one, was not competent testimony. Same.

The seventh, eighth, ninth, and tenth grounds complain of

Notes

error on the part of the circuit judge in what he said to the jury in regard to exemplary damages. These grounds are, practically, based upon the same theory upon which the demurrer was rested, and what he said to the jury was, in fact, nothing more than the legitimate consequence of his ruling as to the demurrer, and, as we have concurred in that ruling, these grounds must be overruled.

The eleventh and twelfth grounds complain of error in refusing the motion for a new trial. Ever since the case of Steele *v.* Railroad Co., 11 S. C. 589, and the case of State *v.* Cardoza, *Id.* 195, we think it should be regarded as settled, in this state, that this court has no jurisdiction to review the action of a circuit judge in refusing a motion for a new trial, either upon the ground of want of evidence to sustain the verdict or for excessive damages. The judgment of this court is that the judgment of the circuit court be affirmed.

New Trials—Review.

NOTES.

Injuries to Passengers—Exemplary Damages for Act of the Carrier.—In certain exceptional cases, where the wrong done is the result of negligence so gross as to indicate indifference to the passenger's safety, or is aggravated by wilful or malicious conduct, the law authorizes the imposition of vindictive, punitive, or exemplary damages. See especially Cleghorn *v.* New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Sullivan *v.* Oregon R., etc., Co., 12 Oregon 392, 53 Am. Rep. 364; Texas Trunk R. Co. *v.* Johnson, 75 Tex. 158.

Various Expressions of the Rule.—In Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373, 6 Am. & Eng. R. Cas. 341, the court, in discussing the subject, said: "Such damages are permissible only where there has been some element of intentional wrong, or, in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences. The idea is variously expressed by different text writers and judges, and sometimes with a multitude of words, but if to the words 'negligence' and 'intention' we add the word 'insult' we will, perhaps, sufficiently embrace all the states of case in which such damages should be awarded by a jury or sanctioned by a court."

It is only in cases of moral wrong, recklessness, or malice, that the exceptional rule of public policy which allows exemplary damages applies. Parker *v.* Long Island R. Co., 13 Hun (N. Y.) 319.

Where the wrongful act is done from a bad motive, or so reckless-

ly as to imply a disregard of social obligations, or where there is negligence so gross as to be equivalent to positive misconduct, exemplary damages may be awarded. Louisville, etc., R. Co. *v.* Fleming, 14 Lea (Tenn.) 128.

To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation. Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381; Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135; Northern Cent. R. Co. *v.* O'Connor, 76 Md. 207, 35 Am. St. Rep. 422.

In Holmes *v.* Carolina Cent. R. Co., 94 N. Car. 318, the rule is stated as follows: "When there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation, in the act of omission causing the injury," punitive damages may be awarded by the jury. And see Knowles *v.* Norfolk Southern R. Co., 102 N. Car. 59; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Rose *v.* Wilmington, etc., R. Co., 106 N. Car. 168.

In torts committed by carriers of passengers through mistake, ignorance, or mere negligence, the ordinary rule of damages is mere compensation; but in such as are committed wilfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury may award exemplary damages. Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517.

Though the exactions imposed upon carriers of passengers "are more numerous and stringent, a nonperformance of them brings to the delinquent just that which a default of duty brings to all men, that is to say, full compensation for thoughtlessness and carelessness, exemplary punishment for recklessness, wilfulness, or insult." Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Right to Give Exemplary Damages in Any Case Questioned.—See McKeon *v.* Citizens' R. Co., 42 Mo. 79; Wardrobe *v.* California Stage Co., 7 Cal. 119, 68 Am. Dec. 231; Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757; Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

Exemplary Damages for Act of Servant.—Where a passenger's right to damages proceeds from the wrongful act of the carrier's servant within the scope of his employment, many of the cases hold that though such act be wilful, malicious, or so negligent as to evince a disregard for the passenger's safety, yet only a full compensation for the injury sustained can be recovered in an action against the carrier, in the absence of proof that the servant's

wrongful act was either previously authorized or subsequently ratified by the carrier, or that the carrier himself participated in the wrong. Hagan *v.* Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. Rep. 882; Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437; Sullivan *v.* Oregon R., etc., Co., 12 Oregon 392, 53 Am. Rep. 364, 21 Am. & Eng. R. Cas. 391; Hays *v.* Houston, etc., R. Co., 46 Tex. 272; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388.

See also *note*, 10 Am. & Eng. R. Cas., N. S., 534 *et seq.*

ATCHISON, T. & S. F. RY. CO.

v.

CUNNINGHAM.

(*Supreme Court of Kansas, Nov. 5, 1898.*)

Injury to Passenger During Receivership—Liability of Succeeding Corporation — Federal and State Courts — Jurisdiction.*—By the terms of the decree of the circuit court of the United States for the district of Kansas entered on the 27th of August, 1895, directing a sale of the Atchison, Topeka & Santa Fe Railroad, and the various properties connected with it, the purchasers were required, as a part consideration for the property purchased, to pay all liabilities incurred by the receivers before delivery of possession of the property sold. *Held*, that a passenger who sustained injuries in a collision of two trains operated by the receivers, for which he had a valid cause of action against them, may maintain an action in a state court of competent jurisdiction directly against the Atchison, Topeka & Santa Fe Railway Company, as the successor of the purchasers, on the assumption of liability required by the decree, and is not required to resort to the court which entered the decree for the recovery of his damages.

Same—Damages—Release—Capacity to Contract.—Where a passenger on a railroad train has his skull fractured, a leg broken, and is otherwise cut and bruised, and remains unconscious for a considerable period of time after receiving the injuries, and four days

*See Texas & P. Ry. Co. *v.* Manton (U. S.), 9 Am. & Eng. R. Cas., N. S., 850, and *note* p. 851.

thereafter a claim agent of the receivers operating the railroad obtains a release of all his claims for damages, in consideration of the sum of $75, and care to be given him at the hospital to which he had been taken, where the evidence to sustain the release shows that the injured party had no thought or concern about his damages, and was in a helpless condition, *held*, that such release is of no validity, and that the claims of error in the admission and rejection of testimony bearing on the mental capacity of the plaintiff to transact business at the time shown by the record in this case are without merit.

(Syllabus by the court.)

ERROR by defendant from Cowley county district court. *Affirmed.*

A. A. Hurd and *Stambaugh & Hurd*, for plaintiff in error.

O. P. Fuller and *C. W. Roberts*, for defendant in error.

ALLEN, J. The plaintiff, Alonzo B. Cunningham, was employed as a railway news agent by the Union Railroad News Company, and traveled on the line of the Atchison, Topeka & Santa Fe Railroad between Kansas City and Albuquerque, N. M. The plaintiff was riding under a permit recognized by the conductors of the railroad company as entitling him to passage, which read as follows: "The Railroad News Company to Conductors Atchison, Topeka & Santa Fe Railroad Company, Trains 3 and 4, Kansas City & Albuquerque Division: The bearer, A. B. Cunningham, whose signature is on the back hereof, is authorized by us to run on your division, as news agent, until Dec. 31, 1895, provided he complies with the rules and regulations of your company. Railroad News Company. Alfred Hamlin, Superintendent." On the back of this was indorsed: "Not transferable. I do hereby agree, in consideration of being carried on the cars of said railroad company, that I will assume all risk of accident of every kind that may occur to me on said railroad. A. B. Cunningham." On the 25th of November, 1895, the plaintiff was riding on an east-bound train which collided with a freight train near the station of Shoemaker, in New Mexico, whereby the car he was in was thrown from the track down a high embankment, causing serious injuries to him. The railroad was then in charge of the receivers appointed by the United States circuit court. The road was afterwards sold, under foreclosure proceedings, to certain persons, who, with their associates, organized a

Case Stated.

new corporation for the purpose of operating the railroad. This action is prosecuted against the new organization to recover damages for the injuries so sustained. The right of the plaintiff to recover of the defendant is based on the terms of the decree of the federal court ordering the sale of the property, in which it was provided: "The purchaser or purchasers, his or their successors and assigns, shall, as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefor upon the express condition that he or they, or his or their successor or assigns, shall pay, satisfy, and discharge any unpaid compensations which shall be allowed by the court to the receivers, and all indebtedness or obligations or liabilities which shall have been legally contracted or incurred by the receivers before delivery of possession of the property sold, and also any indebtedness and liabilities contracted and incurred by said defendant railroad company in the operation of its railroad prior to the appointment of the receivers, which are prior in lien to said general mortgage, and payment whereof was provided for by the order of this court dated January 10, 1894, and filed January 16, 1894, and which shall not be paid or satisfied out of the income of the property in the hands of the receivers, upon the court adjudging the same to be prior in lien to said mortgage, and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation, or liability within the period allowed by the statute of limitations of the state of Kansas for the commencement of such suit thereon after such indebtedness, obligation, or liability was contracted or arose." The decree further provides for the retention by the court of jurisdiction over the property for the purpose of enforcing these provisions of the decree. The answer denied generally the averments of the petition, and specially denied that the defendant assumed any liability existing against the receivers, and alleged that the receivers had made a settlement with the defendant for the injuries for which he sued, and had made full payment of the damages agreed on. To this the plaintiff replied that he had never made any such settlement, and that his signature to the release set up in the answer was obtained by fraud and misrepresentation, and while he was not in his right mind. The action was tried, and resulted in a verdict and judgment in favor of the plaintiff for $6,250. The defendant seeks a reversal of this judgment.

The principal controversy in the case is as to the liability of the present company for claims of this character which accrued during the management of the property while in the hands of the receivers. It is unnecessary to enter into any discussion of the question as to the liability of the defendant, under the statute, as a purchaser of a railroad under a mortgage foreclosure, and as, in effect, merely a reorganization of the old corporation. The terms of the decree under which the defendant purchased could hardly be made more clear, explicit, or comprehensive. The purchaser is required, as a part of the purchase price of the property, and in addition to the sum paid, to pay all liabilities incurred by the receivers before delivery of possession of the property. The plaintiff's claim is clearly a liability incurred by the receivers. The subsequent provisions of the decree with reference to liabilities incurred by the railroad company, which were prior in lien to the general mortgage under which a foreclosure was had, relate to a distinct class of claims. As to claims existing against the old railroad company, the purchasers were only required to assume those which were prior in lien to the general mortgage, and payment of which was provided for by the prior order of the court. But, as to obligations and liabilities incurred by the receivers, the provisions of the decree, as we construe them, are general, and include all claims similar to this, as well as all obligations contracted in the operation of the road. The substance of this provision of the decree appears in the order confirming the sale, and in the deed to the purchasers of the property, by the acceptance of which they are conclusively bound. It is contended that by the provisions of the decree, reserving a right to retake and resell the property for the purpose of enforcing the obligation of the purchaser to discharge these liabilities, the procedure to be pursued by any one for any claim against the receivers is pointed out. This contention, also, is unsound. Under the federal statute the plaintiff had a right to sue the receivers in the state court without permission of the federal court. The obligation assumed by the purchaser is general. It is an obligation to pay. That obligation may be enforced by any court of competent jurisdiction. The contention that there is nothing in the record to show that the defendant had anything to do with any railroad in New Mexico is clearly without merit. There is abundant evidence to show that the receivers operated the line of railroad from Kansas City to Albuquerque. Nor is there any merit in the claim that the

Injury to Passenger During Receivership —Liability of Succeeding Corporation— Federal and State Courts— Jurisdiction.

plaintiff was not a passenger, and that this was a mere accident, the risk of which he assumed under the indorsement on his permit, which he had signed. Just what arrangement for his transportation existed between the news company and the receivers, the evidence fails to disclose, but it was such as was recognized to be valid. The claim that this was a mere accident, and not the result of negligence, is opposed by the rather convincing fact that two trains were moved in opposite directions on the same track at the same time; a freight train attempting to go west while a passenger train was going east on its regular time. The testimony with reference to the speed of the train was properly admitted, but quite unimportant.

Much stress is laid on the admission and rejection of the testimony of the doctors with reference to the character and effects of the plaintiff's injuries. The testimony concerning which complaint is made bore mainly on the validity of the alleged settlement made by the receivers on the 29th of November. The testimony shows that the plaintiff's leg was broken, his skull fractured, and that he was cut and bruised in many places. He was taken out of the car unconscious, and did not regain consciousness until he found himself in the hospital at Las Vegas. From the testimony of the claim agent who made the settlement, it is apparent that the principal concern of the plaintiff at that time was about remaining in the hospital, where he could be taken care of. He says in his direct testimony: "When it came to the matter of dollars and cents, as to his injuries, he did not seem to care. In fact, he said he did not want anything. All he wanted was to have proper care, and that would be satisfactory to him." Where such unseemly haste is made in obtaining settlements with parties who have sustained such serious injuries, and where the amount paid is so trifling, and utterly disproportionate to any just compensation, it seems like wasting time to nicely discuss questions of evidence bearing on the plaintiff's capacity to transact business. Taking the testimony offered by the defendant in its most favorable aspect, the settlement was made at such a time, under such conditions, and on such terms that condemn it as a fraud and imposition. The plaintiff was utterly helpless at the hospital, suffering from the injuries received but four days before. His main, and almost only, concern, according to the testimony of the claim agent, was with reference to his immediate needs in his helpless condition. The sum paid him was not demanded, but rather sug-

Same—Damages—Release—Capacity to Contract.

gested and urged on him by the over-anxious claim agent. Whether the rulings on the testimony were right or wrong is wholly unimportant, under the defendant's own showing. It is claimed that there are many inconsistencies in the answers to the special questions. We have carefully examined all of them, and find nothing to support the claim. Nor is there any merit in the contention that the jury were prejudiced. It would be very difficult to conceive a clearer case of liability than that established by the testimony. Considering the character of the injuries sustained, the verdict does not appear excessive. It has been approved by the trial court, and meets our approval. The judgment is affirmed. All the justices concurring.

MUELLER

v.

CHICAGO, B. & N. RY. CO.

(*Supreme Court of Minnesota, Dec. 22, 1898.*)

Unlawful Use of Mileage Ticket—Ticket Scalpers—Question for Jury.*—Plaintiff bought a mileage ticket from defendant with the funds of a ticket scalper, paid the scalper for the mileage used on one trip, and deposited the remainder of the mileage with him on her return. Thereafter he permitted another to use a part of the remaining mileage, contrary to the terms of the contract with defendant, which contract provided that for such use the ticket should be forfeited. Thereafter plaintiff undertook to use the remainder of the mileage on another trip, when it was taken up, and she was compelled to pay fare, under threat of being put off the train. She testified that, by the terms of her agreement with the scalper, she was to use the ticket, and pay him for each trip as she used it, and he and she testified that he had no authority from her to permit others to use it. *Held*, on the evidence and circumstances, it was a question for the jury whether she or the scalper owned the ticket, and, if she owned it, whether she had authorized the scalper to permit others to ride on it. *Held*, further, if she owned the ticket, and he had no such authority, the ticket was not forfeited.

Threats of Ejection—Excessive Damages.—*Held*, the damages awarded for threatening to put her off the train, and compelling her to pay fare, are excessive.

(Syllabus by the Court.)

See note at end of case.

Mueller *v.* Chicago, B. & N. Ry. Co

APPEAL by defendant from Hennepin county district court. *Affirmed on conditions.*

Young & Lightner, for appellant.
F. A. Gilman, for respondent.

CANTY, J. The plaintiff boarded defendant's railroad train as a passenger, and presented, in payment of her fare, a mileage book or ticket which had been issued to her, but the conductor claimed that the book had been forfeited because another had been allowed to use it contrary to its terms. He retained the book, and demanded that she pay her fare or be put off the train. She then paid it in money, and rode to her destination. She brought this action to recover damages claimed by reason of the foregoing facts, and had a verdict for $213.21, which, on a motion for a new trial, the court reduced to $123.21, as a condition of denying the motion. Plaintiff consented to the reduction, and defendant appeals from the order denying a new trial.

Case Stated.

1. The ticket in question was a 2000-mile ticket. In May, 1896, plaintiff was about to make a trip from Minneapolis to Chicago and return. She applied to T. C. Shove, a ticket broker or scalper. The cost of the 2000-mile ticket was $50, with the right to a return of $10 when the ticket was used up. Shove gave her $35 and an unused portion of an old ticket, which she took to defendant's ticket office, and received therefor the ticket in question, the agent allowing her $15 for the unused portion of the old ticket. She then rode on the new ticket to Chicago and returned, using 804 miles of the mileage. She then delivered the unused portion of the ticket to Shove, and paid him $17 for the part she had used. On January 29, 1897, she again went to Shove's office, and he gave her what remained of the ticket, but, in the meantime, another person had used it for a trip to Chicago and return, using 804 miles more, leaving only 392 miles of mileage in the ticket. This lacked 10 miles of being sufficient to take her to Chicago, so she took it to the ticket office, and paid 42 cents for the balance of her fare, returning the mileage. She also purchased a sleeper ticket. She boarded the train, and between Minneapolis and St. Paul the conductor took up the mileage ticket, and declared that it was forfeited. A part of the contract printed on the ticket, and signed by her, reads as follows: "The right to obtain transportation at a reduced rate, in accordance with the terms of this ticket, is a privilege personal to the person to whom it is issued, whose

signature appears hereon, and who is the only lawful holder, and this ticket and the attached mileage strip are not transferable, and no person other than the lawful holder has or can obtain any rights, title, or property whatever herein; and if this ticket or any portion of the mileage strip, is or is attempted to be sold, transferred, or given away, or if it be presented in any other manner than as herein provided, or if it be found in the hands of any other person than the lawful holder, it shall have no value whatever, and shall be forfeited, and may be taken up when found by any agent of any of the companies over whose lines it is issued." As the mileage was sold for two cents a mile, much less than regular rates, this forfeiture clause was reasonable and valid. In order to avoid the effect of this clause, plaintiff claimed she did not authorize Shove to permit any one else to use the mileage. Plaintiff testified that, by the terms of her agreement with Shove, she was to use the book, and pay for each trip as she used it, and that when she returned from her first trip to Chicago she delivered the book to him as security for the balance due on it, and that she intended to take another trip to Chicago the following fall, and use the mileage again, but failed to do so. She and Shove both testified that she gave him no authority to permit some one else to use the book. At the time of her second trip, she was called to Chicago very suddenly to attend a funeral. The ticket by its terms expired one year from the date of its issue. If it were not for this sudden call, she might have taken but one trip during the year, and neither she nor Shove explain how they expected that, under such circumstances, he would get his money back out of the mileage without selling portions of it to other persons. For this, and other reasons, appellant contends that the testimony is so unsatisfactory that it will not support a finding that Shove, as between himself and plaintiff, had no authority to permit others to use the mileage. We cannot so hold. True, the contract provides that, if the ticket "be found in the hands of any other person than the lawful holder," it shall be forfeited. But this forfeiture clause must be strictly construed, and, in our opinion, if the ticket was found in the hands of some one else without plaintiff's fault, it was not forfeited. If plaintiff owned the mileage, and Shove had no authority to permit others to use it, the ticket was not forfeited. But whether Shove owned the mileage so that, as

Unlawful Use of Mileage Ticket—Ticket Scalper—Question for Jury.

Note

between him and plaintiff, he had a right to permit others to use it, or whether she owned it, and, if so, whether she authorized him to permit others to use it, were, in our opinion, all questions for the jury.

2. It is further contended that the damages are excessive. As the verdict now stands, it allows about $23 for the loss of the mileage which was taken up, and $100 for damages for what otherwise occurred at the time of taking up the mileage and compelling her to pay fare. She testified that the conductor threatened to put her off the train unless she paid fare, and was very gruff and rough about it. He also told her that she was not the Irma Mueller named on the ticket. This all occurred in the separate room or compartment occupied by her alone in the sleeping car, so that she did not have to suffer the mortification of being thus treated in the presence of other passengers. When the train arrived at St. Paul, the conductor offered to take her money and go to the ticket agent and buy her a new ticket. She gave him the money, and he bought the ticket for her. The judge charged the jury that this is not a case for punitive damages, and we agree with him. Defendant had satisfactory evidence that the mileage had apparently been forfeited by being used by another person, had listed it with its conductors as forfeited, and this conductor acted on the instructions furnished by such list. We are of the opinion that, under the circumstances, $100 is excessive as compensation for the injuries in body and mind which plaintiff suffered on that occasion, and that the utmost which can be sustained is $50. It is therefore ordered that a new trial be granted, unless plaintiff, within 10 days after notice of the filing of the mandate herein in the court below, shall file a release of all of the verdict in excess of $73.21. If such release is filed, then the order appealed from shall be affirmed. Under the circumstances, defendant will not be allowed statutory costs on this appeal.

Threat of Ejection—Excessive Damages.

NOTE.

Non-Transferable Tickets.—It has been held that a stipulation in the ticket that it is not transferable and will be forfeited if found in the hands of any but the party in whose name it is issued will render the ticket liable to forfeiture, even in the hands of the original purchaser, if he has, either intentionally or through negligence, permitted it to be used by another. Friedenrich *v.* Baltimore, etc., R. Co., 53 Md. 201.

DENVER & R. G. R. CO.

v.

BEDELL.

(*Court of Appeals of Colorado, Sept. 12, 1898.*)

General Verdict and Special Finding—Inconsistency.—A party cannot be compelled to submit to a summary judgment against him on the ground of the inconsistency of a general verdict in his favor with a special finding in the cause, where the general verdict is warranted by the law and the facts, and the sole inconsistency claimed is a matter of deduction through an erroneous instruction procured by the adverse party.

Injury to Passenger—Concurring Causes—Negligence.*—It appeared that plaintiff was a passenger on defendant's car; that through the negligence of defendant's servants the car doors were suffered to remain open, so that it was filled with cold air, and became uncomfortable; that the car, while plaintiff was undertaking to close the rear door, gave a violent and sudden jerk, which precipitated him to the ground, thereby causing his injuries. *Held*, that it was error to instruct the jury that the leaving of the car doors open could not be considered as establishing any actionable negligence on the part of the company, the accident being the result of the concurrence of defendant's failure to close the doors, and the lurching of the car.

Questions for Adjudication.—Defendant's objection that the question as to the correctness of such instruction is not open to the appellate court, is without merit, it being involved in the determination of the main question before the court.

APPEAL by defendant from Arapahoe county district court. *Affirmed.*

Wolcott & Vaile, and *Henry F. May*, for appellant.

John Lu. Taylor, *A. P. Rittenhouse*, and *Jos. W. Taylor*, for appellee.

THOMSON, P. J. The appellee brought suit against the appellant for injuries alleged by him to have been sustained in

*See notes at end of case.

the following manner: While he was riding in one of the defendant's cars as a passenger, in the vicinity of Gunnison, in this state, in a cool season of the year, the doors of the car were left open, and suffered to remain open for some considerable time, thus causing great discomfort to the plaintiff, and he arose and attempted to shut them. About the time he reached the rear door, the train, which was moving rapidly, encountered an abrupt curve in the track, bringing the car to a quick stop, and then, as he was reaching out to shut the door, causing a sudden start forward, which threw him out upon the platform, and off the car, upon the ground. The court, having instructed the jury, required them to find specially upon particular questions of fact stated in writing, among which was the following: "If you find the defendant guilty of negligence, state what the negligence was." The jury returned a general verdict for the plaintiff, and found specially upon the question of fact before stated, as follows: "Leaving the car door open." The defendant then moved the court for judgment on the special finding, notwithstanding the general verdict. The motion was denied, and judgment entered on the verdict. The defendant is here by appeal. The denial of the defendant's motion for judgment, and the entry of judgment on the general verdict, are assigned for error. We are asked to reverse the judgment entered, and enter judgment for the defendant here, or direct the court below to enter such judgment.

The ground upon which the defendant bases his claim to judgment is that the special finding of fact is inconsistent with the general verdict. Section 199 of the Code leaves it discretionary with the jury to return a general or special verdict. It then makes it their duty, in case they return a general verdict, to find specially upon any particular questions of fact which may be submitted to them by the court, and provides that, when the special finding shall be inconsistent with the general verdict, the special finding shall control, and judgment shall be given accordingly. If, therefore, this special finding is inconsistent with the general verdict, and if the special finding requires the entry of a judgment different from the one which was entered, the position of the defendant is well taken, and it is entitled to the disposition of the case which it asks. Now, placing the special finding and the general verdict side by side, no inconsistency whatever between them is perceivable. On

General Verdict and Special Finding—Inconsistency.

their face they seem to be harmonious. But counsel make use of an instruction, given at their request by the court, to deduce an inconsistency between them. The following is the language of that instruction: "If you believe, from the evidence, that the doors of the car in which the plaintiff was riding were left open after leaving Gunnison, the fact is not to be considered as establishing any negligence on the part of the defendant, from which a cause of action could arise to the plaintiff, for the injury which happened to him cannot be considered a proximate result of such act." The argument is that, under that instruction, the leaving of the doors open was not such negligence as would, in the absence of other negligence of the defendant, authorize a verdict for the plaintiff; and as the only negligence of which the jury, by their answer to the question submitted by the court, found the defendant guilty, was the leaving of the car doors open, therefore the general verdict contradicts the special finding. A special finding will prevail against the general verdict only when it clearly appears upon the face of the record that there is irreconcilable antagonism between them; and, if they can be harmonized upon any hypothesis, the judgment will follow the general verdict. Amidon *v.* Gaff, 24 Ind. 128. Whether this special finding is sufficiently well defined to exclude all inference that the jury in rendering their general verdict had in view any other negligence of the defendant contributing to the injury, we do not think it necessary now to inquire. If it is, then we must assume that the jury regarded the particular negligence found, taken in connection with other conditions leading up to the accident, as sufficient to entitle the plaintiff to a recovery, notwithstanding the instruction. If the instruction correctly stated the law, or was a correct application of the law to the case, then, upon the supposition that the meaning of the finding is that the defendant was guilty of no negligence except leaving the car doors open, the general verdict was against the law, and for that reason it might perhaps be said that it was inconsistent with the special finding; and, if the special finding and the general verdict could not stand together, the motion for judgment on the special finding should have been sustained. But if the instruction was erroneous, if the accident was directly traceable to the defendant's negligence in leaving the car doors open, and if, as a matter of law, the plaintiff had a good cause of action on account of that negligence, notwithstanding the intervention of other conditions,

of which the accident was the more immediate result, and for which the defendant was not responsible, then there was not such inconsistency, within the meaning of the Code, between the special finding and the general verdict, as would authorize the overriding of the general verdict. We do not think that a party can be compelled to submit to a summary judgment against him on the ground of the inconsistency of a general verdict in his favor with a special finding in the cause, where the general verdict is warranted by the law and the facts, and the sole inconsistency claimed is a matter of deduction through an erroneous instruction procured by the adverse party.

In our opinion this instruction was radically wrong. The plaintiff was a passenger on the defendant's car. Through the negligence of the defendant's servants, the car doors were suffered to remain open, so that the car was filled with cold air, and became uncomfortable. The plaintiff, to remove the cause of the discomfort, undertook to close the rear door; and, as he was in the act of so doing, the car gave a sudden and violent lurch, which precipitated him through the doorway, and threw him upon the ground, thus causing the injury complained of. The plaintiff was not bound to endure the discomfort of the car, and incur the risk of contracting some malady. As the railroad company failed to protect him, it was his right to undertake his own protection. But the instruction said that the leaving of the car doors open could not be considered as establishing any negligence on the part of the company for which a cause of action could arise to the plaintiff, because the injury was not the proximate result of the condition. This presentation of the case to the jury was erroneous. While the lurching of the car was the immediate cause of the injury, the plaintiff would not have been exposed to the danger of injury, except for the negligent leaving open of the car doors. The accident was the result of the concurrence of the defendant's negligent failure to close the doors, and the lurching of the car; but, if the former condition had not existed, the plaintiff would have been unharmed by the latter. A party through whose neglect another is exposed to, and sustains, injury, without any fault of his own, from some concurrent cause with which the negligent party may not be specially chargeable, is responsible for the injury. The injury is the direct and logical result of the negligence. Burrows *v.* Coke Co., L. R. 5 Exch. 67; Titcomb *v.* Railroad Co., 94

Injury to Passenger—Concurring Causes—Negligence.

Mass. 254; Hunt *v.* Town of Pownal, 9 Vt. 411; Winship *v.* Enfield, 42 N. H. 197; Davis *v.* Garrett, 6 Bing. 716; Scott *v.* Shepherd, 2 W. Bl. 892; City of Denver *v.* Johnson, 8 Colo. App. 384, 46 Pac. 621. The facts in Burrows *v.* Coke Company were that the defendants furnished the plaintiff with a defective gas pipe, through a hole in which gas escaped. A gas fitter unconnected with the defendants was at work on the internal gas fittings of the premises. When the gas was turned on, it began to escape in the plaintiff's shop. A servant of the gas fitter, being at work in an upper room, on being informed that there was an escape of gas below, went down with a lighted candle in his hand, to discover where the fault in the apparatus was; and, immediately on his entering the shop, an explosion ensued, causing the damage for which the action was brought. It was contended that the bringing of the lighted candle in contact with the gas, and not the defect in the gas pipe, was the proximate cause of the accident, and that the defendants' conduct was too remote to subject them to liability; but the court held the plaintiff entitled to recover, PIGOTT, B., saying: "Now, here the escape of the gas and its ignition was the proximate cause of the injury; but the defective condition of the pipe was the main or efficient cause, and for that defect the defendants are responsible, unless the plaintiff himself contributed to the explosion." In City of Denver *v.* Johnson,the appellant negligently left open and unguarded an excavation on the side of a public street. The appellee was driving along the street, and, a tramway car approaching from behind, he undertook to escape it by turning his team aside. The result was that one of his horses went into the excavation, and by its plunging, occasioned by its fright, placed the wagon in such position that it was struck by the car, and the appellee thrown out and injured. The argument for the appellant was that the proximate cause of the injury was the collision of the car with the vehicle, and not the open excavation. But this court held that it was not necessary that the negligent act to which the injury might be charged should be the last cause; that the question was whether it was the responsible cause; that, while it was the collision which threw the appellee out, if there had been no excavation there would have been no collision; and that, while the collision was the more immediate cause of the injury, the principal, and therefore the responsible, cause, was the excavation. So, in this case it may be said that the sudden and violent motion of the car was the immediate cause

of the injury; but the main and responsible cause, and without which the other would have been harmless, was the leaving open of the doors. The special finding and the general verdict are, so far as we can see, entirely consistent, unless an inconsistency can be argued into them through the instrumentality of the erroneous instruction; and we do not think an inconsistency of that kind available to the defendant.

But it is asserted that the question whether the instruction was a correct statement of the law is not open to this court, because it was not objected to below, and because no cross error is assigned upon it here. It is true that a party, by failing to interpose objections at the proper time, may be concluded by instructions given at the instance of the adverse party. If in this case the verdict had been for the defendant, and the plaintiff were here seeking a reversal on the ground of error in the instruction, we should most certainly hold that his objection came too late. Whether, if the defendant, instead of moving for judgment because of the alleged inconsistency between the special and the general finding, had moved for a new trial on the ground of the jury's disregard of the instruction, we should feel ourselves warranted in reversing the judgment, is a question which does not now require discussion. However, it has been held that, by the disregard of an erroneous instruction, no legal wrong is done to the party at whose request it was given. McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631. But here the defendant seeks to use an instruction palpably erroneous, and which it induced the court to give, not for the purpose of opening up the judgment and permitting a retrial of the facts, but for the purpose of foreclosing forever the plaintiff's remedy for the wrong of which he complains, and converting a verdict in his favor into a judgment against him, from which he has no possibility of escape. The Code provision that, when the special finding shall be inconsistent with the general verdict, the special finding shall control, was never designed to enable one party to convert an error, committed at his own instigation, into a weapon for the destruction of the rights of the other. The defendant is not relying on the instruction to sustain a judgment in its favor, nor is the plaintiff assailing the instruction to secure the reversal of a judgment against him. It is therefore wholly immaterial whether the plaintiff objected to the instruction or not. His attitude towards the instruction is in no manner involved in the question which

Questions for Adjudication.

has been submitted to us for decision. That question is whether, upon its face, the special finding is so inconsistent with the general verdict as to necessitate a judgment for the defendant, notwithstanding the general verdict. Such inconsistency is not palpable, and certainly it is not allowable to deduce it from an error committed in behalf of the party asserting it. The motion was properly denied, and the judgment is affirmed. Affirmed.

NOTES.

Concurrence of Accident and Negligence.—Where an accident and a want of ordinary care concur in producing an injury, the negligent person is liable for the consequences if, without his negligence, the injury would not have been caused by the accident alone. This is upon the principle, applicable throughout the law of negligence, that where there are concurring causes of an injury, one of such causes being negligence, the negligent person cannot escape liability if, notwithstanding the other contributing causes, the injury or a part of the injury would not have occurred had the negligent person been in the exercise of ordinary care. Romney Marsh *v.* Trinity House Corp., L. R. 5 Exch. 204, L. R. 7 Exch. 247, 2 Thomp. on Neg. 1063; Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Pollett *v.* Long, 56 N. Y. 200; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 38 N. Y. St. Rep. 675; Durkin *v.* Sharp, 88 N. Y. 225; Searles *v.* Manhattan R. Co., 101 N. Y. 661; Seeley *v.* New York Cent., etc., R. Co., 102 N. Y. 719, 2 N. Y. St. Rep. 452; Grant *v.* Pennsylvania, etc., Canal, etc., Co., 133 N. Y. 657, 45 N. Y. St. Rep. 305.

In Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354, it is said: "The fact that a natural cause contributes to produce an injury which could not have happened without the unlawful act of the defendant does not make the act so remote as to excuse him."

And the same principle has been stated thus: "We apprehend that the concurring negligence which, when combined with the act of God, produces the injury, must be such as is in itself a real producing cause of the injury, and not merely a fanciful or speculative or miscroscopic negligence which may not have been in the least degree the cause of the injury. In other words, if the act of God in this particular case was of such an overwhelming and destructive character as, by its own force, and independently of the particular negligence alleged or shown, produced the injury there would be no liability, though there were some negligence in the maintenance of the particular structure. To create liability it must have re-

Notes

quired the combined effect of the act of God and the concurring negligence to produce the injury." Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166.

For further cases to the same point, see: Lambkin *v.* South Eastern R. Co., L. R. 5 App. 352; Dixon *v.* Metropolitan Board of Works, 7 Q. B. Div. 418; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 356, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407; Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

Injury Received while Attempting to Avoid Inconvenience—Contributory Negligence.—If the passenger is suffering some inconvenience only, and to avoid that he voluntarily runs into an obvious danger and injury ensues, he will be guilty of contributory negligence, and cannot recover. Adams *v.* Lancashire, etc., R. Co., L. R. 4 C. P. 739; Gee *v.* Metropolitan R. Co., L. R. 8 Q. B. 161.

The door of a carriage compartment in which plaintiff was being carried as a passenger on the defendant's railway flew open several times through the negligence of the defendant. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. The plaintiff shut the door three times. The door opened a fourth time, and in endeavoring to shut it again the plaintiff fell out and was hurt. The train stopped at three stations between the time when the door first opened and the occurrence of the accident. It was held that as the inconvenience that the plaintiff would have suffered if he had not shut the door was slight, and the peril incurred in his attempt to shut it considerable, the injury suffered was not the necessary or natural result of the company's negligence, and they were therefore not liable for such injury. Adams *v.* Lancashire, etc., R. Co., L. R. 4 C. P. 739.

But it has been said that if the inconvenience is very great, and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger. Adams *v.* Lancashire, etc., R. Co., L. R. 4 C. P. 739.

Where a passenger, sitting close to the front door of a crowded car when passing through a tunnel, attempted to shut the door while the car was in total darkness, in order to keep out the smoke and cinders, and in doing so was injured, it was held that the court below properly refused to instruct the jury that the plaintiff was chargeable with contributory negligence. Western Maryland R. Co. *v.* Stanley, 61 Md. 266, 48 Am. Rep. 96.

GRAHAM

v.

MCNEILL.

(*Supreme Court of Washington, Jan. 6, 1899.*)

Carriers of Passengers—Riding on Platform through Necessity—Notices—Waiver.*—The railroad company waived its notice against standing on the platform of the car by failing to have suitable accommodations for plaintiff within the cars after receiving him on the train.

Same—Duty to Seat Passengers.†—It is negligence on the part of a railroad company to allow its train to leave a station in such an overcrowded condition that passengers are obliged to stand upon the platforms.

Questions for Jury—Instructions.—The question of negligence, and also that of contributory negligence, was for the jury, and both questions were fairly submitted by the instructions given.

APPEAL by defendant from Whitman county superior court. *Affirmed.*

Cotton, Teal & Minor, for appellant.
M. O. Reed, for respondent.

REAVIS, J. Action to recover damages for personal injuries sustained by plaintiff while a passenger on a railway train operated by defendant. The complaint alleges that on the 7th of October, 1895, at the town of Oakesdale, plaintiff purchased from an agent of defendant an excursion ticket which entitled plaintiff to be transported as a passenger from Oakesdale, in the state of Washington, to the city of Spokane and return, on or before the 9th day of October, 1895; that plaintiff was transported according to the terms of the ticket to Spokane, and on the 9th of October, 1895, while returning home, at the instance

Case Stated.

*As to Riding on Platform, see East Omaha St. R. Co. *v.* Godola (Neb.), 7 Am. & Eng. R. Cas., N. S., 300, and extensive *notes*, p. 305 *et seq.*

†See note at end of case.

and request of defendant, and pursuant to the terms of the ticket, plaintiff entered one of the coaches of defendant's train carrying passengers from Spokane to Oakesdale, and by reason of the very crowded condition of the cars was unable to obtain a seat or room in any one of defendant's coaches, and was compelled to ride, and did ride, upon the platform of one of the cars of the train, and while so riding the conductor permitted, compelled, and allowed the plaintiff to occupy such position upon the platform without objection or protest, well knowing at the time the overcrowded condition of each and every one of the coaches in said train, and while the plaintiff was standing as aforesaid on the platform, by reason of the negligent, irregular, improper, overcrowded, overloaded, and careless manner in which the said train was being run by the defendant, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden careless and unnecessary lurch of the train, caused by the carelessness of the defendant, his servants and employees, in the management and operation of said train, thrown from the platform to the ground in a violent manner, and sustained serious injuries. The answer denies all of the allegations of negligence and damage contained in the complaint, and sets up an affirmative defense, and, in substance, states contributory negligence, by allegations that the plaintiff was drinking when he left Spokane, and continued to drink, and was so far under the influence of liquor as to be intoxicated, and that such intoxication was not known to the defendant; that, after the train left, the plaintiff was standing upon the platform, in a position where, if he had exercised care in preserving his balance, he would not have been injured; that while so standing on the platform the plaintiff's hat was blown off by the wind, and the plaintiff negligently and carelessly released his hold upon the railing of the car, and with his right hand undertook to catch his hat, and in so doing lost his balance, fell from the platform to the ground, and was thereby injured, and that the plaintiff was not thrown from the platform by a careless or unnecessary, or any, lurch of the train; that while so standing and exercising care the plaintiff was in a safe position, where he could not have received the injuries complained of. The answer also affirmatively contains the following allegation: That the fact that the plaintiff was occupying the platform was not known to any of the defendant's agents or servants, and that the position occupied by

the plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence. The plaintiff's reply merely denies each and every allegation of new matter contained in the separate defense of the answer. Evidence was submitted by both parties upon the issue of contributory negligence tendered by the defendant,—upon the part of plaintiff, that he exercised due care while standing on the platform; and by defendant, some evidence tending to show that plaintiff attempted to catch his falling hat, and thereby fell. No evidence was directly introduced as to whether the platform, under the circumstances, was in itself a dangerous place, or otherwise. The evidence showed that an excursion train was advertised, and passengers invited to procure tickets therefor from Oakesdale to Spokane, to visit the fruit fair in the latter city; and the advertisement also requested the passengers to notify the agent, so that necessary equipments could be ordered. A large number of passengers were carried to Spokane between Monday, the 7th, and the 9th of October. On the 9th the railroad company carried a crowd of people home on 12 coaches, drawn by one engine. The evidence tends to show that all the seats were occupied, and that the aisles were very much crowded, in the respective coaches, and that people were riding on all the platforms of the train. The plaintiff got on the train at Spokane on the 9th and passed through six crowded coaches, looking for a seat. The aisles were crowded with people standing along between the seats and leaning over upon them. The plaintiff then took a position on the platform at the rear end of the coach, where he stood. There were six other passengers standing between the two coaches, one or two of them being ladies; and there were ladies generally, as well as men, carried on a number of the platforms of the coaches. The conductor took up the ticket of plaintiff while he was standing upon the platform, and said nothing about the position which plaintiff or any one else occupied on the platform. While the train was going at considerable speed, and on rather an incline, use of the air-brake caused the coach on the platform of which plaintiff was standing to jolt or lurch, and plaintiff was thrown from the train and injured. After the introduction of testimony on the part of the plaintiff had been concluded, defendant moved for a nonsuit, which was overruled; and thereafter, at the conclusion of the case, defendant asked for an instruction for a verdict for itself, which was refused. A verdict was returned for plaintiff, and judgment entered thereon.

A number of objections were taken to the instructions of the court by the counsel for the defendant. Instructions which are deemed material here were given as follows: "Now, gentlemen of the jury, if you find from the evidence in this case that the plaintiff was a passenger upon this train at the time alleged, and that he fell or was thrown from the train or from the platform—as alleged in both the complaint and answer, I believe—of one of the coaches, it is for you to determine from the evidence in this case, first, as to whether or not the plaintiff was on that platform from his own choice, or whether or not the cars of the defendant upon that occasion were crowded in such a condition that it necessitated him to take up a position upon the platform in question in order to ride from Spokane to Tekoa." "Now, you are further instructed by the court that if you find from the evidence in this case that there was no room inside of the cars for the plaintiff to either sit or stand, or that there was any other reason justifying the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent being thrown from the train, by the motion thereof, from where he was; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train by the motion thereof which could reasonably be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant." "The jury are further instructed that it is the duty and obligation of a common carrier of passengers for hire to furnish passengers with seats for their accommodation; and, if you find from the testimony in this case that the defendant in this case received the plaintiff as a passenger, the plaintiff thereby became entitled to a seat in one of the cars of the defendant's train, and it is not the duty of the plaintiff to go from car to car while the train is in motion to find a seat; and if the defendant received the plaintiff as a passenger, and failed to furnish plaintiff with a seat, then the court instructs you that it was not negligence for the plaintiff to take a position upon the platform of one of the defendant's cars, provided that said position was one where a person exercising ordinary care and prudence would be safe from injury if the train of the defendant were run in a careful manner. The jury are further instructed that if you find from the evidence in this case that

the defendant failed to furnish accommodations for the passengers on the train mentioned, so that a large number of passengers upon that train were compelled to stand in the aisles and upon the platforms of those cars, then you must find that the defendant was guilty of negligence; and, if you find that the defendant was guilty of negligence, you cannot find that the defendant is liable to the plaintiff in this action, unless you find the plaintiff himself was free from negligence upon his part." "The jury are instructed that, if there were no vacant seats in the car of defendant, the plaintiff is not chargeable with negligence in standing on the platform of the car of the defendant, providing that you find that was the most comfortable and convenient place for the plaintiff to occupy on the trip; and the defendant is not absolved from liability for injury to a passenger while riding on the platform of a car, unless the defendant provided room inside of the car for the proper accommodation of the passengers, and that a mere space on the inside, in which to stand between the seats, is not ordinarily such proper accommodation. If the jury find from the evidence in this case that there were in fact no vacant seats in the car of the defendant, it is for you to determine whether it was negligence on the part of the plaintiff to stand on the platform, even if there was room to stand in the inner gangway. And you are further instructed that in no case can you find for the plaintiff, unless you find that the defendant was guilty of some negligence, by himself or some of his agents or servants." "If the defendant was guilty of negligence in furnishing seats for the passengers, including the plaintiff, but the plaintiff, through his own carelessness and negligence, caused the injury, then you should find for the defendant." The court, at the request of defendant, gave the following instruction: "If you find from the evidence that there was no room inside the car for the plaintiff to either sit or stand, or that there was any other reason [to] justify the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent from being thrown from the train, by the motion thereof, while running; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train, by the motion thereof, reasonably to be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant."

The testimony discloses that notices were posted on the coaches of defendant's train that passengers must not stand on the platform, and that passengers were not allowed to go upon the platform of the car while the train was in motion. It will be observed that the complaint charged that, while the plaintiff was standing on the platform, by reason of the careless manner in which the train was being run, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden, careless, and unnecessary lurch of the train, caused by carelessness of the defendant in the operation of the train, thrown from the platform to the ground in a violent manner. And the answer, after denying the negligent acts charged in the complaint, alleges that the position occupied by plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence, and that plaintiff was standing upon the platform in a position where, if he had exercised care in preserving his balance, he would not have been injured. An inspection of the record at the trial indicates that the theory upon which the defense was conducted was that the plaintiff contributed to the falling from the train by his own carelessness in balancing and standing upon the platform. The question of the occupation of the platform by plaintiff in itself being dangerous was not particularly brought to the attention of the court or jury until instructions were requested. It was insisted by the defendant, however, during the trial, that it was not negligence contributory to the accident, on the part of the defendant, to fail to have the necessary cars and provide the necessary accommodations for its passengers returning from Spokane on the 9th of October. Counsel for defendant now urge that it is *prima facie* negligence, or negligence *per se*, as a matter of law, for a passenger to stand upon the platform of a railway train in motion, and that, where such position is plainly the cause of the passenger's injury, he is guilty of negligence, as a matter of law, and that, where such position is not plainly the cause of the injury, the question of contributory negligence should be left to the jury as a fact. And the familiar rule is stated that every man in the possession of his faculties is responsible for the consequences reasonably to be anticipated from his own acts, and it is contended that reasonably prudent men do not, under ordinary circumstances, stand upon the platforms of trains in motion, and, when the passenger is thrown from the

platform by some sudden lurch or jerk, then his standing upon the platform is plainly the cause of his injury; and many cases are cited by counsel, some of which sustain their contention, but some of which are upon facts essentially different from those in the case at bar. For illustration, in the case of Railway Co. *v.* Moneyhun (Ind. Sup.) 44 N. E. 1106, the plaintiff went out, not upon the platform, but upon the lower steps of the platform, and leaned over, and by a lurch of the train was thrown therefrom. A number of cases are also cited upon the presumption of negligence from the happening of the accident, and the presumptions arising therefrom, and also other cases where proper accommodations were provided for the passenger inside the coach, and he left and went out, and stood on the platform. But none of the cases examined are exactly in point with the facts under consideration here. In Hutch. Carr. (2d Ed.) § 652, it is stated: "Whether standing upon the platform of a railway car voluntarily, and without any necessity for so doing, would be evidence of the want of such due and reasonable care on the part of the passenger as would exonerate the company from liability in case of an accident resulting in his injury, would, of course, depend upon all the circumstances, and would be the proper subject of inquiry by a jury." See Willis *v.* Railroad Co., 34 N. Y. 670; Werle *v.* Railroad Co., 98 N. Y. 650; Graham *v.* Railway Co., 149 N. Y. 336, 43 N. E. 917; Merwin *v.* Railway Co., 113 N. Y. 659, 21 N. E. 415. Beach, Contrib. Neg. (2d Ed.) § 149, says: "It is not negligence *per se* for a passenger to ride upon the platform of a railway car; nor is it negligence to stand upon the platform of cars in motion, when there are no vacant seats inside the car." In Willis *v.* Railroad Co., 34 N. Y. 670, it was said: "There is no rule of the common law which makes it the duty of the passenger to the carrier to select a position in the vehicle least exposed to danger through the wrongful act of the proprieter. A seat on the outside of a stage coach may be more hazardous than an inside seat, if the driver negligently overturns it on a pavement or a hillside; but the selection of that position is neither negligence *per se*, nor tributary, in a legal sense, to the injury." MR. JUSTICE MILLER, in Marquette *v.* Railroad Co., 33 Iowa, 564, said: "It is not, at common law, necessarily negligence in a passenger to ride on the platform of a car. Meesel *v.* Railroad Co., 8 Allen, 234. It certainly is not improper for him to do so, if he cannot get a seat inside. Shear. & R. Neg. § 284. Nor is it negligence in passengers,

unable to find seats in a car, to pass into another, by direction of the conductor, while the train is in motion. McIntyre *v.* Railroad Co., 43 Barb. 532. For while moving from one car to another, without cause, while a train is in motion, may be negligence, yet, if a passenger does so in obedience to a direction or request of the officer in charge of the train, the act may be deemed consistent with proper care, since passengers have a right to rely on the judgment of the officers of the train in respect to such matters, and are bound to obey the reasonable directions of such officers. Shear. & R. Neg. § 285. In judging of what is negligence in a particular case, regard is to be had to the growth of science and the improvement of the arts which take place from time to time; for many acts or omissions which are now evidence of gross negligence were but a few years ago consistent with great care and skill, and, on the other hand, many things which a few years since would have been considered negligence are now consistent with proper care and skill. Shear. & R. Neg. § 7. And especially is this true in respect to railroad carriages, which within a few years have been transformed from crude and clumsy cars into magnificent traveling palaces, supplied in many cases with the comforts, conveniences, and even luxuries of elegant dwellings, in which the public may travel at a speed and with a degree of safety which thirty years ago would have been in the highest degree perilous to life and limb. And within a very short period there have been such wonderful improvements in the platforms and couplings of railway passenger coaches as that passengers may, with comparative safety, pass from the other cars of a train to the sleeping and dining coaches, on some of the fastest trains of this country, while in motion. Daily, ladies,—with and without gentlemen,—by hundreds, pass from car to car, and especially to sleeping and dining coaches, while the train is moving at a rate of speed much above twenty miles an hour, and yet accidents from this practice seldom occur. It cannot be true, therefore, as a matter of fact, that to pass from one car to another while the train is in motion at the usual rate of speed is so necessarily dangerous that it may not be justified under any circumstances; nor can it be true, as a fact, that the removal of a passenger from one car to another while the train is moving at its regular speed is so necessarily dangerous as that it cannot lawfully be done by the officer in charge of the train, under any circumstances, or for any cause. But, if the fact were otherwise, it should be left to the jury to find upon the evi-

dence, and it is not the province of the court to pronouce it so as matter of law." 2 Wood, Ry. Law § 308, declares the rule: "A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that the passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there." See, also, secton 308, as to the duty of the railroad company to furnish each passenger with a seat. It cannot be successfully maintained now that the platform of a railway train is necessarily such a position of danger that no ordinarily prudent person would go upon it while the train was in motion. Such contention would be false to common experience in railway travel. Prudent and careful persons do frequently go across platforms of moving trains, and do stand upon them; and the conductors of trains do collect fare from passengers upon platforms, and frequently on ordinary roadways, and in first-class passenger coaches do not take any notice of such position of travelers. As observed by some of the courts, the modern improvements for safety in coaches, platforms, train appliances, and roadways have largely modified the risk of standing on the platform. But the defendant in this instance had a notice to the passengers to keep off the platform. Companies may make reasonable rules, and the passenger must obey them. Such a rule could doubtless be enforced, but such rules may also be waived by the acts of the company. Hutch. Carr. *supra*, very fairly states the rule. But the defendant in this case waived its notice against standing on the platform when it failed to provide suitable accommodations for the plaintiff inside its coaches and yet received him on its train. In the case of McQuillan *v.* City of Seattle, 10 Wash. 465, 38 Pac. 1120, it was said, "Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury."

Carriers of Passengers—Riding on Platform through Necessity—Notices—Waiver.

The evidence discloses clearly that the defendant was negligent in its duty to the passenger when the train left Spokane in its overcrowded condition. Not only it did not furnish seats for the passengers, but the passageways inside the coaches were crowded by standing passengers, and the platforms had men and women standing thereon who could not be accom-

Same—Duty to Seat Passengers.

modated inside the coaches; and, as has been observed by some of the authorities, it is the duty of the conductor to seat passengers. The instructions given by the superior court are not phrased in happy terms, perhaps: but, taken together, the question of contributory negligence, and also of the principal negligence, was fairly submitted to the jury, and the case cannot be reversed because the language used in the instructions was not aply chosen, and may be open to criticism. The judgment is affirmed.

Questions for Jury—Instructions.

ANDREWS, DUNBAR, and GORDON, JJ., concur.

NOTE.

Carriers of Passengers—Duty to Furnish Seat.—It is the duty of the carrier to furnish seats to its passengers. St. Louis, etc., R. Co. *v.* Leigh, 45 Ark. 368, 55 Am. Rep. 558; Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149; Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 12 Am. St. Rep. 610; Louisville, etc., R. Co. *v.* Patterson, 60 Miss. 421; Thorpe *v.* New York Cent., etc., R. Co., 76 N. Y. 492, 32 Am. Rep. 325; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 Am. St. Rep. 776; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495. See also Camden, etc., R. Co. *v.* Hoosey, 99 Pa. St. 492.

"There can be no doubt that a passenger on a railroad who exhibits his ticket and demands a seat has a right to have that demand complied with prior to the surrender of that which constitutes, in the very nature of the case, the best evidence of his contract with the company for safe and comfortable transportation. But it is equally true that he must adhere to and rely on that contract, or, if there be a non-compliance with its terms in any reasonable and essential particular on the part of the company, he must abandon the contract and quit the train so soon as suitable opportunity offers." Davis *v.* Kansas City, etc., R. Co., 54 Mo. 317, 14 Am. Rep. 457.

Unless a sudden and unusual influx of passengers renders it impracticable the conductor of a passenger train must provide a seat for a ticket holder in the car in which his ticket entitles him to ride, and to do this must, if necessary, limit passengers to single seats. Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421.

Where all the seats in one of two passenger cars are already filled with passengers, another passenger has no right to demand a seat in that particular car, and to refuse to pay his fare or deliver his his ticket unless furnished a seat in such car; and if he refuses under such circumstances, to deliver his ticket or pay his fare, the persons in charge of the train may rightfully eject him therefrom. Pittsburgh, etc., R. Co. *v.* Van Houten, 48 Ind. 90.

SOUTHERN RY CO.

v.

BRYANT.

(Two Cases.)

(*Supreme Court of Georgia, July 26, 1898.*)

Carrying Passengers beyond Station—Instructions—Error—Damages.*—In an action for damages growing out of a breach of contract of carriage entered into between a passenger and a railway company, it was error to charge that: "In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the tresspass, or as compensation for the wounded feelings of the plaintiff" (Civ. Code, § 3906),—and: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts, should be weighed." (*Id.* § 3907).

Under the facts of the present cases, verdicts for $250 and $300 are excessive in amount.

(Syllabus by the Court.)

ERROR by defendant from Polk county superior court. *Reversed.*

Shumate & Maddox, for plaintiff in error.

Wright & Ewing, for defendants in error.

SIMMONS, C. J. Two young ladies purchased railroad tickets over the line of the Southern Railway Company from Atlanta to a flag station called "Hamlet." It seems that the engineer omitted to give the signal of an approach to Hamlet, by reason whereof the conductor failed to signal the engineer to stop at that place. The conductor did not

*See Southern Ry. Co. *v.* Hardin (Ga.), 10 Am. & Eng. R. Cas., N. S., 250, and *notes*, p. 259.

discover that the train had passed Hamlet until it had gone about half a mile beyond. He then apologized to the ladies for having carried them beyond their station, expressed his regret, and told them that he would either leave them at the next station, or carry them on until he met the down train, put them on that, and have them brought back to Hamlet. They chose to stop at the next station. On arriving there, they alighted, and were carried into the reception room at the station, where there was a good fire and light. There they remained for about three hours, when they boarded the down train. They arrived at Hamlet shortly before day. There was no one to meet them at that place, and they walked a quarter of a mile, through a field, to their father's house. They brought their actions against the railway company for damages, and on the trial of the case the jury returned verdicts for both of them,—$250 in favor of one, and $300 in favor of the other. The railway company moved for new trials. The motions were overruled, and the company excepted. The alleged errors were in giving in charge to the jury the sections of the Code which are set out in the first headnote, and in not granting new trials because the verdict in each case was excessive and contrary to law.

1. The first portion of the charge set out in the headnote is a copy of section 3906 of the Civil Code. In the case of Railway Co. *v.* Hardin (Ga.) 28 S. E. 847, this same section of the Code was given in charge under a state of facts somewhat similar to those above recited, and this court held that the section was inapplicable, and that it was therefore error to give it in charge to the jury. We deem it unnecessary to elaborate here the reasons given in that case by ATKINSON, J., as to why it was error to give this section in charge. It is sufficient to say that the decision in that case is controlling in these. In regard to the other portion of the charge given in the headnote (section 3907 of the Civil Code), it is only necessary to say that in several decisions of this court it has been declared error to give the whole of that section in charge in cases like the ones now under consideration, or even in cases where actual physical injuries have been sustained. Railroad Co. *v.* Senn, 73 Ga. 705; Railroad Co. *v.* Homer, *Id.* 251; Railway Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100. In cases of this character the worldly circumstances of the defendant should not be considered by the jury. In these particular cases the question of defendant's bad faith should not be considered, for there was no evidence to au-

thorize the judge to charge upon this subject, nor facts shown from which the jury could properly infer bad faith upon the part of defendant. The plaintiffs do not claim to have sustained any pecuniary injury for loss of time or expenses incurred, nor that they have sustained any physical injury; and the only part of this section which should have been given in charge (and even then not in the words of the section) was that the jury could give such damages as their enlightened consciences might approve. These sections of the Code cannot properly be given in every case sounding in tort. They simply announce principles, and, as a whole, are not applicable to every case. The trial judge may give one principle in one case, and another in another case; giving each as the facts of the case may require or warrant.

2. It may have been that these erroneous charges caused the jury to find these excessive verdicts. The jury may have considered, without proof, the worldly circumstances of the railway company, and may have thought that a rich corporation had acted in very bad faith because its engineer had failed to signal the approach to the station, and may have come to the conclusion from these facts that these young ladies were entitled to such large damages for a detention of three hours in a comfortable room. The evidence shows that they suffered no loss, were not frightened, were well treated and comfortable. The conductor was polite, and the agent at the station where they stopped over treated them with courtesy. Their only annoyance appearing in the record was that one of them thought their father would be disappointed at their not arriving at their home at the time appointed. We cannot conceive how an honest jury, acting without partiality or bias against the defendant, could, under the facts, have returned such verdicts. There are hundreds and thousands of women, and men, too, in this country, who work daily the whole year for less than was given by the jury to these girls for the slight inconvenience of being detained three hours. If these girls had hired a carriage and driver, and the latter had driven them two miles beyond their destination, as a result of unintentional negligence, and brought them back after they had waited three hours in a comfortable room, we have no idea that, in suits by them against the owner of the carriage, these jurors would have returned these verdicts. Yet the law is the same in both cases. The violation of a contract, caused by negligent

omission of duty, is in each case the ground of recovery. We are compelled, after carefully reading the evidence in both the cases now under consideration, and finding only a very slight cause of action, to say that the verdicts are excessive, and must have been brought about not only by the erroneous charge of the court, but by bias and prejudice on the part of the jury. Judgment reversed. All the justices concurring.

RICKERT

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Nov. 22, 1898.*)

Province of Court.—It is not within the province of the court to decide as to the credibility of witnesses, the weight of the evidence, or the facts in the case.

Inviting Passenger to Alight from Moving Train.*—There may be a recovery against a railroad company for injuries resulting to a passenger from the negligence of its conductor in inviting the passenger to alight from a train moving at the rate of 3 or 4 miles an hour.

APPEAL by defendant from Iredell county superior court. *Affirmed.*

Charles Price, *G. F. Bason*, and *A. B. Andrews, Jr.*, for appellant.

Armfield & Turner, for appellee.

FURCHES, J. The facts disclosed by the trial of this case strongly impress us with the belief that the plaintiff was not entitled to a verdict in his favor. At the same time, we cannot say that there was not evidence that entitled him to go to the jury, and, if believed, to a verdict; and we cannot review the findings of the jury, however much we might differ with them. But we will say that, outside of all the evidence on the part of the defendant contradicting the evidence offered by the plaintiff, it was not

Case Stated.

*See note at end of case.

a very reasonable statement that if the plaintiff paid his fare from Salisbury to Statesville, as he says he did, he would have ridden all the way from Salisbury to Statesville in an open coal car, early in the morning of December 23d (only two days before Christmas), when he was entitled to a comfortable seat in the caboose. But if there is error in the findings of the jury, as we have said, they cannot be corrected in this court, unless the judge who tried the case committed an error of law on the trial. If this were so, and a new trial ordered on that account, this would vitiate the verdict; but it would not be because we have the power to review the findings of the jury, or had done so; and, upon a careful examination of the record, we find no error in law committed by the court below on which we can give a new trial.

There are several exceptions taken by the defendant, and, while none of them are formally abandoned, the defendant, in its brief, discusses but one of them. The issues submitted are as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans. Yes. (2) Was the plaintiff guilty of contributory negligence? Ans. No. (3) What damage is the plaintiff entitled to recover by reason of said injuries? Ans. $500." For the purpose of sustaining the plaintiff's contention, the plaintiff testified that he paid his fare as a passenger from Salisbury to Statesville on the defendant's freight train, leaving Salisbury early in the morning of December 23, 1896; that he rode in an open box car used for hauling coal, where he could be seen and was seen; that he only paid his way from Salisbury to Cleveland station, and at Cleveland he paid his fare from that place to Statesville; that, when the station whistle sounded at Statesville, the train "slowed up" to three or four miles an hour, and the conductor, from the window of the caboose, signaled him to get off, and, in attempting to do so, he slipped, caught his foot in the stirrup, and was injured. He was corroborated by other testimony as to the conductor's giving the signal by the wave of the hand, and as to the fall and injury. All this evidence was flatly contradicted by the engineer and crew of the train. But, still, it was evidence for the jury, which they might believe, and did believe. It would seem that the defendant thought it material, if believed, as it offered evidence to contradict it. But, whether the defendant thought it material or not, it was material if believed, and the court could not say it should not be believed. As to whether it should be believed or not was a question for the jury alone.

Note

Upon this evidence, the defendant's first prayer for instructions, and the only one discussed in the brief, was that, upon all the evidence, the court should instruct the jury to find the first issue, "No." The court refused to give this prayer, and committed no error in doing so. Had the court given this prayer for instruction, it would have been deciding upon the credibility of witnesses, the weight of the evidence, and the facts in the case, and would have been in direct violation of section 413 of the Code. This prayer is, in effect, a demurrer to the evidence, and admits, for the purposes of the prayer, that all the evidence is true. Such prayer can only be given in cases where the party asking the instruction is entitled to a finding upon the issue in his favor, taking all the evidence for the other side to be true, considered in the most reasonable light for the other side. Baker *v.* Brem, 103 N. C. 72, 9 S. E. 629; Nelson *v.* Whitfield, 82 N. C. 46; Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1. Taking the plaintiff's evidence to be true, he was a passenger on the defendant's train, and when it slowed up, he was told to get off, and was injured in so doing. This was negligence. Lambeth *v.* Railroad Co., 66 N. C. 495; Hinshaw *v.* Railroad Co., 118 N. C. 1047, 24 S. E. 426.

Province of Court.

Inviting Passenger to Alight from Moving Train.

We have examined the charge of the court, and find it full, fair, and correct. The court, among other things, charged the jury that, if they believed (found) from the evidence that the plaintiff was stealing a ride, he could not recover, or if the conductor did make signals with his hand, not intended for the plaintiff, and the plaintiff mistook them, and undertook to get off the train, and was injured, he could not recover. We find no error in refusing the instructions asked, nor in the instructions given. Affirmed.

NOTE.

Leaving Moving Train on Invitation of Conductor.—A passenger is not guilty of negligence *per se* in jumping from a moving train by the advice or order of conductor or other authorized servant of the carrier, on whose opinion or judgment in the matter he has a right to rely, if the danger of such an act would not be apparent to a prudent man, as where the train at the time was moving slowly; and in such case it becomes the province of the jury to say how far the passenger's act may be excused. South, etc., Alabama R. Co. *v.*

Schaufler, 75 Ala. 142; Highland Ave., etc., R. Co. *v.* Winn, 93 Ala. 309; St. Louis, etc., R. Co. *v.* Person, 49 Ark. 182; St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Georgia R., etc., Co. *v.* McCurdy, 45 Ga. 288; McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553; Schurr *v.* Houston, (Buffalo Super. Ct.) 10 N. Y. St. Rep. 262; Pittsburgh, etc., R. Co. *v.* Krouse, 30 Ohio St. 222.

But if the danger attending such conduct on the part of the passenger is so obvious that a prudent man would not encounter it, as where at the time the train was moving at a rapid rate of speed he is, as a matter of law, guilty of contributory negligence and cannot recover for an injury sustained thereby. Whitlock *v.* Comer, 57 Fed. Rep. 565; East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388; Jeffersonville R. Co. *v.* Swift, 26 Ind. 459; Bardwell *v.* Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842. See also Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Pittsburgh, etc., R. Co. *v.* Crouse, 30 Ohio St. 222. *Compare* Southwestern R. Co. *v.* Singleton, 66 Ga., 252.

AYERS

v.

ROCHESTER RY. CO.

(*Court of Appeals of New York, June 7, 1898.*)

Injury to Passenger—Negligence—Sufficiency of Evidence.*—In an action for injuries to a passenger on a street car caused by the motion of the car when started at a curve, where it appears that the accident was not the reasonable, natural and probable result of the situation, which ought to have been foreseen by defendant in the exercise of a degree of care exacted from a carrier of passengers, there can be no recovery.

APPEAL by defendant from Fifth department supreme court, general term. *Reversed* and *remanded*.

Charles J. Bissell, for appellant.

Thomas Raines, for respondent.

BARTLETT, J. This is an action to recover for personal injuries alleged to have been sustained by the plaintiff while

*See note at end of case.

a passenger on one of defendant's street cars in the city of Rochester by reason of the negligence of the company.

The plaintiff, a young lady 22 years of age at the time of the accident, was a teacher in the public school. The defendant operated a trolly line; and the plaintiff boarded one of its cars on the 13th of March, 1893, at the junction of Emerson street and Backus avenue, where the tracks turn from the former into the latter street. At the point where the plaintiff entered the car, it had stopped on a curve. It appears that the alleged injury suffered by the plaintiff was not due to starting the car, for she had gotten on board, but happened a moment later, when she was about to take her seat, and the car passed with more or less violence of motion from the curve onto the straight track. On the plaintiff's direct examination she stated as follows: "I stepped onto the first or second step when the bell was rung, and as I got a few steps in the car it gave a sudden jerk, and twisted my knee, and I went back violently on the seat. * * * When this jerk occurred I had gotten a few steps in the car, —about half-way between the door and the stove. I was just about ready to sit down, when my weight was on my right knee, and twisted me, and it seemed as though it twisted everything out of place. It threw me back on the seat. If the seat had not been there, I think I would have gone on the floor." She also stated that when she left the car she limped, was in great pain, and went immediately home and to bed. On cross-examination plaintiff testified: "It gave me a twist; twisted me right around, like that. I fell down. If the seat had not been there, I would have gone on the floor. I fell down on the seat back of me. I did not strike my knee when I fell. As soon as I was in the seat, I felt that I had hurt myself. I was in misery all the way home." The plaintiff put upon the stand a business man who was in the habit of riding daily upon these cars. He testified as follows: "When the car goes around onto the curve from Emerson street, and stops on Backus avenue, the front wheels of the car are just about off the curve: the hind wheels of the car are on the curve. When they start at that point there is not much motion (that is, the car does not swing around so fast), but when it starts back further, near the crosswalk, there is a side motion of perhaps two or three feet, perhaps two feet; and when they start off quickly, if a a man is in the rear end of the car it has a tendency to throw him to one side, which has often been the case with myself.

I have seen others thrown in the same manner." This is substantially the plaintiff's case, except the medical testimony. It is not claimed that the verdict for $1,250 is unreasonable, if the defendant was guilty of negligence. The plaintiff's injuries were proved in detail, but it is unnecessary to consider them at this time. It is undisputed that they were very serious, and while not permanent, in the opinion of the physicians, were likely to deprive plaintiff of the free use of her limb for from six months to three years after the trial, which took place nearly a year subsequent to the accident. The defendant swore the motorman who was running the car at the time of the accident. He admits that he was a comparatively green hand, and did not know of the occurrence until the following June. He testified as follows: "When I was learning first, I might have observed that I had a tendency to let the power on too quick. It takes experience to graduate the power to the necessities of the case. When a man first goes on to learn, he is under a disadvantage in starting off, in exactly measuring what will move the car. * * * I don't recollect who instructed me in regard to that line or that route. No one ran over it with me to show it to me, only when I was first turned in." The defendant put upon the stand several conductors to show that it was their custom to allow passengers to step on the car before ringing the bell to start it, but that it was not usual to wait until they had taken their seats unless there was evidence of age or infirmity. This, with some medical testimony, makes up the defendant's case.

The question of defendant's alleged negligence lies in a very narrow compass. There is no direct proof that the motorman, in driving his car from the curve to the straight track at the time of the accident, employed more electrical power than was necessary to properly accomplish that result. The question is whether it was a fair inference to be drawn by the jury that there was an excess of power used, by reason of the fact that when the plaintiff was in a standing position, and about to take her seat, she was so violently twisted and prostrated as to cause the injuries disclosed. Plaintiff's witness already referred to, who testified as to the effect of the curve upon the cars, stated that "when they started off quickly" certain results followed, to wit, a tendency to throw a passenger to one side, and that he had often observed it. The difficulty in this case is that we have no evidence whatever as to the speed of the car, or excess of electrical power

Note

used, while passing the curve, if such be the fact. It is well known that a car in passing around a curve is subjected to a somewhat violent motion. It is incidental to the situation, is something that must be guarded against by every passenger, and the railroad company is liable only when the speed is excessive. It would be a very harsh rule that would hold a company liable for a possible injury resulting while passing at a proper speed over a curve that has long been in use, and where no accidents are shown to have happened. While we recognize the fact that this is a very close case, we are of the opinion that it was error to submit the question of defendant's negligence to the jury. This case falls clearly within the rule that where an accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the defendant in the exercise of the degree of care exacted from a carrier of passengers, no liability follows. Dougan *v.* Transportation Co., 56 N. Y. 1; Loftus *v.* Ferry Co., 84 N. Y. 455; Cleveland *v.* Steamboat Co., 125 N. Y. 299, 26 N. E. 327. If it can be shown that this degree of care was not exercised, a case for the jury would be presented. The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgement reversed, etc.

NOTE.

Proximate Cause of Injuries—Definition.—It is laid down in many cases, and by leading text writers, that "in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequences of the negligence or wrongful act, and that it was such as might or ought to have been forseen in the light of the attending circumstances."

Notice the language of the United States supreme court in the leading case of Milwaukee, etc., R. Co. *v.* Kellogg (94 U. S. 469, 475): "It is admitted that the rule is difficult of application, but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances." So in another leading case, Hoag *v.* Lake

Note

Shore, etc., R. Co. (85 Pa. St. 293, 298; 27 Am. Rep. 653,), the court in passing upon the question of proximate cause observes: "A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far * * * The true rule is that the injury must be the natural and probable consequence of the [defendant's] negligence—such a consequence, as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim *causa proxima, non remota spectatur;* it only affects its application." And this principle as laid down by the foregoing authorities is supported by a long array of cases of high authority. Greenland *v.* Chaplin, 5 Exch. 248; Clark *v.* Chambers, 3 Q. B. Div. 327; Sharp *v.* Powell, L. R., 7 Ch. 253; Illidge *v.* Goodwin, 5 Carr. & P. 190; Borradaile *v.* Brunton, 8 Taunt. 535; Ward *v.* Weeks, 7 Bing. 211; Kelly *v.* Partington, 5 B. & Ad. 645; Harrison *v.* Berkley, 1 Strobh. L. (S. Car.) 525; s. c., 47 Am. Dec. 578; Pittsburgh, etc., R. Co. *v.* Taylor, 104 Pa. St. 306; s. c., 49 Am. Rep. 580; Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 252, 8 Am. & Eng. R. Cas. 59 (where leading case of Milwaukee, etc., R. Co. *v.* Kellogg was cited and approved); McDonald *v.* Snelling, 14 Allen (Mass.) 290 (cited and approved in Scheffer *v.* Washington City, etc., R. Co.); s. c., 92 Am. Dec. 768, 771; Morrison *v.* Davis, 20 Pa. St. 171, 175; Campbell *v.* Stillwater, 32 Minn. 308; s. c., 50 Am. Rep. 567-569, *note*; Lane *v.* Atlantic Works, 111 Mass. 136; Hill *v.* Winsor, 118 Mass. 151; Atchison *v.* Goodrich Transp. Co., 60 Wis. 141; Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Tutein *v.* Hurley, 98 Mass. 211; Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404 (tall brakeman on tall car); McClary *v.* Sioux City, etc., R. Co., 3 Neb. 44; Township of West Mahoney *v.* Watson, 112 Pa. St. 574; Cooley on Torts 69-71; Bishop on Non-Contract Law, § 43; Louisville, etc., R. Co. *v.* Guthrie, 10 Lea (Tenn.) 432, 11 Am. & Eng. R. Cas. 478; Glover *v.* London, etc., R. Co., L. R., 3 Q. B. 25.

McCURRIE

v.

SOUTHERN PAC. CO.

(*Supreme Court of California, Dec. 6, 1898.*)

Passenger Injured on Platform—Negligence*—Question for Jury.—After the train had stopped at a regular station, plaintiff, a passenger, went upon the platform, not for the purpose of alighting, but to meet his son. The train gave a violent jerk, and, to save himself from falling, plaintiff took hold of the door casing, and his hand was injured by the swinging to of the door. *Held*, that whether the injury was the result of the company's negligence was a question for the jury.

Contributory Negligence—Same.—Whether plaintiff was guilty of contributory negligence in going upon the platform was a question for the jury.

In bank. APPEAL by plaintiff from city and county of San Francisco, superior court. *Reversed.*

F. J. Castelhun, for appellant.
W. H. L. Barnes, for respondent.

HARRISON, J. Action to recover damages for personal injury alleged to have been sustained by reason of the negligence of the defendant. The appeal is from a judgment in favor of the defendant and from an order denying a new trial. The plaintiff testified that he purchased from the defendant a ticket to go from San Francisco to Tennant's station, in Santa Clara county, and that he boarded the train at Third and Townsend streets in San Francisco. He further testified: "When we arrived at Twenty-Fifth and Valencia streets, the brakeman or conductor opened and fastened the front door of the car in which we were sitting in the usual way. I waited until I saw the door was fastened and the train stopped, and then got up to look for my son, who was waiting to see us. I went to the front to beckon to him, because the train does not stop long there. As I got to the platform, the train suddenly backed with a

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*See notes at end of case.

very great jerk, so violently that it threw me off my balance, and to save myself I caught hold of the casing of the door. Just then the door swung to and struck my hand, cutting three fingers very severely;" and on cross-examination he testified : "I left my seat after the train stopped, and went to the front platform of the car, and stood partly in and out of the car,—just in the doorway. I won't be certain whether I stood on the platform or whether I was in the doorway, because the time was short. I called my son and he came up. The car gave a lurch backward, I think. I caught hold of the casing of the door to save myself from falling, and just then the door swung to and caught my hand. I went back to my seat led by my son." His wife testified : "We boarded the train together at Third and Townsend streets. At the Valencia street station the car stopped, and my husband went out to the platform to beckon to our son to come into the car and see me. The train gave a violent jerk backwards and then forwards. I thought it would throw him to the ground. He put out his hand to take hold of the door casing, and then the door became unfastened and swung to and struck his hand. My son assisted him back to his seat. He was very faint." His son testified that he was waiting at the Valencia street station to see his father, and said : "When I got opposite the platform I saw him coming through the door. Just as I was about to step up on the platform the train went back with a sudden jerk, and then went ahead with a jerk. I had to look out for myself, for the train was moving a little. I saw he was falling. I tried to save him. He had thrown his hand up and caught hold. I did not see the door strike his hand, but I saw it as it swung back again. I led him back to his seat. The jerk was very violent,—a jerk sufficient to make him lose his balance." Testimony tending to show the extent of the injury was also given on behalf of the plaintiff, and at the close of his testimony the court, upon the motion of the defendant, instructed the jury to find a verdict in favor of the defendant, which was accordingly done.

Passenger Injured on Platform—Negligence—Question for Jury.

When the negligence of the defendant is the basis of the plaintiff's right of recovery, it is the province of the judge to determine whether the evidence submitted by the plaintiff has any legal tendency to establish negligence, and it is for the jury to determine whether it is sufficient therefor. If there is no evidence from which a jury would have the right to infer negligence, the judge may withdraw the case from them ;

but, if the evidence is such that negligence may be inferred, he has not the right to withdraw the question from the jury upon the ground that, in his opinion, they ought not to make such a finding, and thus substitute his judgment for theirs upon a question of fact which the plaintiff has the right to have determined by a jury. If the evidence in a case would authorize a jury to find a verdict in favor of the plaintiff, the court is not at liberty to take the case from the jury, and substitute his own determination of that question for that of the jury. The rule is the same whether the court is asked to grant a nonsuit or to direct a verdict in favor of the defendant. In either case the motion should be denied if there is any evidence from which the jury would be authorized to find a verdict in favor of the plaintiff.

The evidence on behalf of the plaintiff showed that the relation of passenger and carrier existed between him and the defendant at the time he received the injury, and there was also evidence tending to show that the injury was caused by the act of the defendant in the management and conduct of the train in which it had undertaken to carry him as a passenger. A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operatng the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part. The case then falls within the rule given by Shearman and Redfield on Negligence(section 59): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." See, also, Boyce *v.* Stage Co.,25 Cal. 460; Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266; Bush *v.* Barnett, 96 Cal.202, 31 Pac. 2; Judson *v.* Powder

Co., 107 Cal. 549, 40 Pac. 1020; Madden *v.* Railroad Co., 50 Mo. App. 666; Dougherty *v.* Railroad Co., 81 Mo. 325; Lavis *v.* Railroad Co., 54 Ill. App. 637; Whart. Neg. § 661; Cooley, Torts, 663. At the time the plaintiff received the injury, the train had stopped at one of its regular stations upon the road, and after it had stopped was moved backward with a sudden jerk, and then suddenly forward, by reason of which the plaintiff lost his balance, and was compelled to steady himself by taking hold of the casing of the door. The evidence tended to show that the injury to him resulted from the manner in which the train was moved by the defendant after it had stopped. If the case had been submitted to the jury upon this evidence, it would have been sufficient to authorize a verdict in his favor (Bush *v.* Barnett, *supra*), and the court erred in directing a verdict for the defendant. It would appear that the door swung to by reason of the jerking of the train, and, if so, the sufficiency or extent to which it was fastened back by the conductor was immaterial. It cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury. The judgment and order are reversed.

Contributory Negligence.

WE concur: BEATTY, C. J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.

I dissent: MCFARLAND, J.

NOTES.

Carriers of Passengers—Presumption of Negligence.—The presumption of negligence on the part of the carrier arises in cases of injuries to passengers arising from defects in the means of transportation. Harrison *v.* London, etc., R. Co., 1 C. & E. 540; Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60; Baltimore, etc., Co. *v.* State, 63 Md. 135; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 37 Am. Rep. 410; Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666; Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Hitchcock *v.* Brooklyn City R. Co., 44 Hun (N. Y.) 627, 8 N. Y. St. Rep. 848; Miller *v.* Ocean Steamship Co., 118 N. Y. 199; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Clow *v.* Pittsburgh Traction Co., 158

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Pa. St. 410; Fleming *v.* Pittsburgh, etc., R. Co, 158 Pa. St. 130, 38 Am. St. Rep. 835; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394.

Wheel Coming Off.—Ware *v.* Gay, 11 Pick. (Mass.) 106.

Coupling Pin Breaking.—McLean *v.* Burbank, 11 Minn. 277.

Explosion of Lamp.—Presumption of negligence held to arise. Wilkie *v.* Bolster, 3 E. D. Smith (N. Y.) 327.

Broken Wheel of Car.—Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613. The presumption, however, is rebutted by evidence that the wheel was manufactured and tested by the most skilful manufacturers, and that wheels of that kind were in common use.

Broken Axle.—Dawson *v.* Manchester, etc., R. Co., 7 H. & N. 1037; Thatcher *v.* Great Western R. Co., 4 U. C. C. P. 543; Ohio, etc., R. Co. *v.* Voigt, 122 Ind. 288; Hegeman *v.* Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Alden *v.* New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Meier *v.* Pennsylvania R. Co.,64 Pa. St.225,3 Am. Rep. 581.

Broken Bolt.—Germain *v.* Montreal, etc., R. Co., 6 L. C. Rep. 172.

Coupling Pin Breaking.—Goodrich *v.* Pennsylvania, etc., Canal etc., Co., 29 Hun (N. Y.) 50.

Defective Fastening to Door.—Gee *v.* Metropolitan R. Co., L. R. 8 Q. B. 161.

Explosion of Locomotive Boiler.—Robinson *v.* New York. Cent., etc., R. Co., 20 Blatchf. (U. S.) 338.

Sleeping Car Berth Falling.—Presumption of negligence held to arise. Cleveland, etc., R. Co. *v.* Walrath, 38 Ohio St. 461.

Fall of Car Window.—The presumption of negligence, however, has been held not to arise from the fall of a car window from the ledge on which it rests while closed. Murray *v.* Metropolitan Dist. R. Co., 27 L. T. N. S. 762. *Compare* Och *v.* Missouri, etc., R. Co., 130 Mo. 27.

Defective Curtain Hook.—And in Kelly *v.* New York, etc., R. Co., 109 N. Y. 44, it was held that the presumption of negligence did not arise where a passenger was injured in alighting from an open street railway car by having her dress catch upon a broken curtain hook.

Same—Same—Where Act of Passenger Contributes to Injury.—The presumption of negligence does not arise where the injury is caused by some defect in the means of transportation combined with some deliberate and voluntary act on the part of the passenger. Pennsylvania Co. *v.* Marion, 104 Ind. 239; Miller *v.* St. Louis R. Co., 5 Mo. App. 471. See also Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Morel *v.* Mississippi Valley Ins.

Co., 4 Bush. (Ky.) 1, 96 Am. Dec. 320; Todd *v.* Old Colony, etc., R. Co., 3 Allen, (Mass.) 21, 80 Am. Dec. 49; Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 238, 64 Am. Dec. 502; Pittsburgh, etc., R. Co. *v.* McClurg, 56 Pa. St. 294; Texas, etc., R. Co. *v.* Overall, 82 Tex. 247; Weaver *v.* Baltimore, etc., R. Co., 22 Wash. L. Rep. (D. C.) 393.

Riding in Improper Places.—In Tuley *v.* Chicago, etc., R. Co., 41 Mo. App. 432, the presumption of negligence was held not to arise where a passenger riding on top of a car was thrown off by the shock in coupling cars.

Fall in Leaving Car.—East Tennessee, etc., R. Co. *v.* Mitchell, 11 Heisk. (Tenn.) 400.

Fingers Caught in Door.—Metropolitan R. Co. *v.* Jackson, L. R. 3 App. 103.

See, however, Chicago, etc., R. Co., *v.* Pondrom, 51 Ill. 333, 2 Am. Rep. 306; New Jersey R. Co. *v.* Kennard, 21 Pa. St. 203; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Spencer *v.* Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758.

McDONNELL

v.

NEW YORK CENT. & H. R. R. CO.

(*Supreme Court of New York, Appellate Division, Fourth Department, Dec. 9, 1898.*)

Injury to Passenger—Act of Fellow Passenger—Liability of Company.*—A railroad company cannot be held responsible for a passenger's injuries resulting from the unauthorized and uncalled for application of the emergency brake by another passenger.

Exceptions.—Exceptions to the admission of evidence not taken to the questions propounded to a witness, but occurring in a colloquium between the counsel and the court, will not be considered on appeal.

APPEAL by plaintiff from Jefferson county trial term. *Affirmed.*

Argued before HARDIN, P. J., and FOLLETT, ADAMS, and WARD, JJ.

Frank C. Sargent, for appellant.
Henry Purcell, for respondent.

*See notes at end of case.

McDonnell *v.* New York, etc., R. Co

HARDIN, P. J. Plaintiff was a member of an excursion party that left Picton and other parts of Canada on the 12th day of July, 1897. They were brought to Cape Vincent by boat, and from there were transported in two different special trains over the defendant's road to the city of Watertown. The excursion party left Watertown at about 6:30 o'clock in the evening to return to Cape Vincent. The defendant provided for the excursion party 18 cars. The party consisted of 840 passengers. The carrying capacity of the cars was 1,152. After the cars had passed some 19 miles from the city of Watertown, the accident occurred of which the plaintiff complains. The train was brought to a sudden stop, and he was precipitated upon the ground. There was a conflict in the evidence whether he was on the platform of the fourth car from the front at the time of the occurrence of the accident, or whether he was inside of the door. His own testimony, and that of a witness who supports him, is to the effect that he was inside the car, near the door. Several witnesses testify, to the contrary, that he was on the platform ; and there are several admissions indicative that he was himself careless at the time the injuries were received. In order to justify a recovery against the defendant, it was incumbent upon the plaintiff to establish that he was guilty of no negligence which contributed to the injury, and that the defendant was guilty of such negligence as caused the injury. Deyo *v.* Railroad Co., 34 N. Y. 9. That case quotes with approval Bowen *v.* Railroad Co., 18 N. Y. 408, and also quotes from Story on Bailments the rule in respect to the liability of a common carrier to its passengers, which rule is in the following language : "Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go ; that is, to the utmost care and diligence of very cautious persons." In commenting upon that rule, DAVIES, J., said : "The familiar form of expressing the rule of duty of the carrier is, 'as far as human care and foresight will go.' Negligence is the violation of the obligation which enjoins care and caution in what we do." In that case "some evil and malicious person had drawn out spikes, and pushed some of the rails from their bed, and by this means the engine and part of the cars were turned off the track," and the plaintiff was injured. At the circuit plaintiff was nonsuited, and the judgment was sustained at general term, and in the court of appeals. The same doctrine was

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approved in Palmer *v.* Canal Co., 120 N. Y. 170, 24 N. E. 302.

Upon the trial now brought in review it was insisted by the defendant that the principle applied in the cases to which reference has been made was applicable to the case in hand. Evidence was given, tending to establish that, while the train upon which the plaintiff was riding was in motion at the rate of about 20 miles an hour, one of the passengers in the rear coach went to the end of the car with a view of getting some water to drink, and, not finding the water readily in the tank, he looked up, raised up his hand, and suddenly pulled the lever controlling the emergency brake, and caused the same to operate so fully and so suddenly that it brought the train to a standstill in about half the length of the car, except that the engine and the three forward cars, having been severed, continued about 150 feet. The plaintiff insists that he was inside of the fourth car from the engine at the time the train was brought to a standstill, and that he was precipitated through the open door onto the ground, and received the injuries of which he complains. The evidence in behalf of the defendant indicates that he was upon the platform at the time the train was stopped, and that he was precipitated from the platform onto the ground. Evidence was taken upon the trial as to whether the stoppage of the train was caused by the application of the air brakes by one Smith, who was in the rear car, and testified that he pulled the lever. The plaintiff's theory was that the breaking in two of the train caused the plaintiff to be precipitated out of the car, and onto the ground. The conflicting theories maintained by the respective parties at the trial were very extensively discussed in the charge submitted by the learned trial judge to the jury, and the question in its various aspects was explained to the jury, and the weight of the evidence supports the finding of the jury that the unauthorized application of the air brakes to the train caused the same to be broken in two, and the sudden jar threw the plaintiff onto the ground. The plaintiff was a committeeman, having some duties to do in respect to the excursion, and he had passed from the rear cars forward, and had entered the foremost cars, and apparently was returning when the accident occurred. The evidence satisfactorily indicates that there were plenty of seats in the first three cars near the engine, and there is some evidence that there were seats in some of the other cars, unoc-

Injury to Passenger—Act of Fellow Passenger—Liability of Company.

cupied, and that the plaintiff might have occupied a seat in the train without any difficulty, which he failed to do. Grave questions of fact were presented for the jury to determine as to whether the defendant had been guilty of negligence and the plaintiff free from contributory negligence. Certain admissions made by plaintiff, if believed, would warrant the jury in finding that he was not free from contributory negligence.

At the time the accident occurred the defendant was using the Gould coupler, and it gave evidence that that coupler was in use generally in the state of New York, and evidence tending to show its worthiness for the purposes for which it was designed. After the close of the defendant's evidence in chief the plaintiff put upon the stand one Kellogg, who testified that he was an inspector of cars in Jersey City, and that he was familiar with the different kinds of couplers, and that the Gould coupler was used upon the Lehigh Valley Railroad and West Shore Railroad, and that he inspected some 100 Gould couplers every day, and some 425 Janney couplers, used on the Pennsylvania Railroad. He then explained the construction of the Gould coupler to a considerable extent, and, upon certain objections being made to some questions propounded to the witness, the court observed: "You may show, if you please, if you want to show, that in the operation of this coupler that there may be mistakes, and that it might not be properly coupled when they start. That is one thing. But to show that there is any defect in the Gould coupler,—that it is not a proper coupler to be used,—I don't see how you can do that." The witness was then allowed to give further description of the Gould coupler, and of its operations, and his observations in respect thereto; and an exception was taken to the remark of the court that he would not permit a litigation to show that one coupler or one brake was better than another, inasmuch as it appeared that the Gould coupler was in general use in the state. The exceptions were not taken to the questions propounded to the witness, but occurred in the colloquium that ensued between the counsel and court, and in some instances the evidence was received after intimations made by the court adverse thereto. Besides, it appears that the cars were inspected before the train left Watertown, and there is no evidence indicating that the parting of the train was caused by any omission to properly couple the cars; and a large volume of the evidence indicates that the uncoupling was

Exceptions.

caused by the power of the engine at the time the air brakes were applied by Smith in the rear coach.

Judgment and order affirmed, with costs. All concur.

NOTES.

Carriers of Passengers—Injury Caused by Stranger.—The presumption of negligence on the part of the carrier, arising from an injury to a passenger, may be rebutted by showing that it was the wilful act of a stranger which the carrier in the exercise of the highest degree of care could not have guarded against. Latch *v.* Runner R. Co., 27 L. J. Exch. 155; Worth *v.* Chicago, etc., R. Co.,51 Fed. Rep. 171; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9; Fredericks *v.* Northern Cent. R. Co., 157 Pa. St. 103.

United States.—Post *v.* Koch, 30 Fed. Rep. 208.

Indiana.—Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168; Louisville, etc., R. Co. *v.* Lucas, 119 Ind. 583.

Iowa.—Allender *v.* Chicago, etc., R. Co., 43 Iowa 276.

Louisiana.—Lehman *v.* Louisiana Western R. Co., 37 La. Ann. 705; Moses *v.* Louisville, etc., R. Co., 39 La. Ann. 649, 4 Am. St. Rep. 231.

New Jersey.—Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Am. St. Rep. 442; Falk *v.* New York, etc., R. Co., 56 N. J. L. 380, 58 Am. & Eng. R. Cas. 191.

New York.—Murphy *v.* Rome, etc., R. Co., (Supreme Ct.) 32 N. Y. St. Rep. 381; Van Ostran *v.* New York Cent., etc., R. Co., 35 Hun (N. Y.) 590, *affirmed* 104 N. Y. 683; Redner *v.* Lehigh, etc., R. Co., 73 Hun (N. Y.) 562; Hazman *v.* Hoboken, etc., Co., 2 Daly (N. Y.) 130; Onderdonk *v.* New York, etc., R. Co., 74 Hun (N. Y.) 42.

Pennsylvania.—Dunn *v.* Pennsylvania R. Co., 20 Phila. (Pa.) 258.

Texas.—Missouri Pac. R. Co. *v.* Long, 81 Tex. 253, 26 Am. St. Rep. 811.

Safest Appliances—Duty to Provide.—Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 27, cited with approval in Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 23 Am. St. Rep. 308, was a case in which a female passenger alighting from a car was injured by an unsafe footrest between the lower step of the car and the ground; the court, while declining to say that it was the duty of employees of the carrier to give assistance to persons entering or leaving a train, if proper means for doing this with safety were furnished, said that the carrier owed her the duty of providing not only a reasonably safe appliance for enabling her to alight in order to make the transfer, but the safest that had ever been known and tested."

PENNY

v.

NEW YORK CENT. & H. R. R. CO.

(*Supreme Court of New York, Appellate Division, Oct. 25, 1898.*)

Arrest of Passenger by Company's Detective—Scope of Employment.*—Plaintiff alleged that when he had purchased a ticket and was about to board defendant's train, he was seized and illegally imprisoned in the baggage room by an employee of defendant. But it did not appear from the evidence that plaintiff was entitled to board the train as a passenger; nor that defendant was responsible for his arrest or imprisonment. It did appear, however, that a person employed by defendant as a detective searched plaintiff while he was imprisoned. But no proof was given showing the duties of such detective, what authority he possessed, or what he was directed to do, except as the court would be authorized to infer from the term "detective." *Held*, that the motion for nonsuit should have been granted, the detective's authority to search plaintiff not sufficiently appearing from the evidence.

Unwarranted Instruction.—It was reversible error to charge that plaintiff was illegally arrested by defendant's employees, and that defendant was liable, the contrary appearing from the evidence.

APPEAL by defendant from trial term. *Reversed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

Charles F. Brown, for appellant.
Graham Witschief, for respondent.

HATCH, J. This is an action brought to recover damages for an alleged illegal arrest and imprisonment of the person of the plaintiff. The complaint avers that:

"The plaintiff having purchased a ticket for Newburgh, N. Y., and being about to board a train of the West Shore Railroad Company bound for that place, was seized by an employee of the defendant, who, maliciously and without probable cause and without au-

Case Stated.

*See note at end of case.

thority of law, * * * locked him up in a small room used by defendant for a baggage room in the railroad station at Highland, N. Y. [the station at which the plaintiff attempted to board the train], and then and there searched the clothes and person of plaintiff, and subjected him to other indignities, against his protests, and there detained the said plaintiff as a prisoner, and restrained him of his liberty against his will for the space of an hour and one-half."

Upon the trial there was no evidence given showing that the plaintiff purchased a ticket of the defendant entitling him to ride to Newburgh, or that he was in possession of any ticket which entitled him to ride upon defendant's train to Newburgh, or to any other place upon defendant's road; nor did the plaintiff show any legal right to board the train he was attempting to board when the arrest was made. He did not therefore stand in the relation of a passenger to the defendant, and may not, in consequence, invoke the rule which obtains when such relation is established. The averments of the complaint in this respect stand wholly unsupported by the proof. It also appears by the evidence that the person who made the arrest, and the one who guarded plaintiff's place of imprisonment, and forcibly detained him therein, were not employees of the defendant, and had no connection whatever with it. Nor did it appear that these persons were directed to arrest and detain the plaintiff by any person connected with the defendant, or that they were acting in its behalf. There was therefore no basis upon which liability of the defendant could be predicated for acts committed by these persons. It did appear by the proof that one Morehead entered the place where the plaintiff was confined after his arrest, searched his clothing, committed some indignities upon his person, and applied to him abusive language. The evidence established that Morehead was employed by the defendant as a detective, and was subject to directions by its law department. No proof was given showing what duties were devolved upon Morehead, what authority he possessed, or what he was directed to do, except as the court would be authorized to infer from the term "detective." The case is barren of evidence showing any direction by Morehead to arrest the plaintiff, and it is also barren of proof showing any affirmative direction by the defendant to Morehead either to compass the arrest of the plaintiff or to do the acts which he did after the plaintiff was arrested.

The general rule is that the master is responsible for the acts of a servant where he has granted authority or imposed a duty to act in respect of the business in which the servant was engaged when the wrong was committed, and the act complained of was pursuant to the course of employment in which the servant was engaged or had authority to do. Cohen *v.* Railroad Co., 69 N. Y. 170. It matters not that the servant's acts are reckless, and thereby is inflicted unnecessary injury, or that he abuses his authority or departs from his instructions, or through infirmity of temper adds slander to his other wrongdoing; all are unavailing to shield the master so long as the things which are done are done in the prosecution of the business of the master. Palmeri *v.* Railway Co., 133 N. Y. 261, 30 N. E. 1001. And this is the rule even though such acts be not only negligent, but wanton and willful. Burns *v.* Railroad Co., 4 App. Div. 426, 38 N. Y. Supp. 856. Unless acting within the scope of authority, the master is not responsible for the servant's acts. Meehan *v.* Morewood, 52 Hun, 566, 5 N. Y. Supp. 710, *affirmed* 126 N. Y. 667, 27 N. E. 854; Mulligan *v.* Railway Co., 129 N. Y. 506, 29 N. E. 952. Those cases sufficiently illustrate the distinction, and the subject needs no further elaboration. The negligent or willful misconduct of the servant must not only be shown, but equally so that the act was within the scope of employment, before liability of the master is established. The rule, like many others, is clear; the difficulty lies in applying it to particular facts. As applied to the present proof, we think liability was not established. There is no such settled significance attached to the term "detective" as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts. Where the business of the master requires the performance of such acts, and the employment of the detective is in connection therewith, or if there be expectation that he may be required to make arrests in the discharge of the duties intrusted to him, liability may attach. But it is essential that evidence of such conditions be given sufficient to warrant the inference. In some cases slight proof would be required, depending in large measure upon the business prosecuted by the master, from which a jury might find the act to be within the scope of employment. But it is quite well known that the term "detective" is applied to persons in the employ of various individuals and corporations whose authority is limited to the collection of evidence and the performance of other

acts having sole reference to civil litigation. Some are employed in the surveillance of employees suspected of bad habits and practices which unfit them for retention in places of trust and confidence. There exists a wide scope of employment of persons called "detectives," which scarcely has connection with crimes or criminals, and in which no arrest of persons is authorized or contemplated. Under such circumstances there would exist no authority for holding the master responsible for the arrest, detention, and search of an individual. Such case would fall within the determination made in Mali *v.* Lord, 39 N. Y. 381, where the master was held exempt.

Upon the proof in this case, we are of opinion that the acts of Morehead were not made to appear as having been committed within the scope of his authority. From all that appears, it is quite as consistent with the conclusion that he acted from personal motives, and for his own purposes, as that he acted in the prosecution of any matter committed to his care by the defendant. If there were doubt upon this point, it would present a question for the jury. Rounds *v.* Railroad Co., 64 N. Y. 129. Upon the evidence, however, there was not sufficient to warrant a submission of the question to the jury, and the motion for a nonsuit should have been granted.

Arrest of Passenger by Company's Detective—Scope of Employment.

There was also a fatal error committed in the charge of the court. The learned judge charged that the arrest was made by the servants of the defendant without any justification, that the defendant was liable, and the only question was one of damages. To this charge exception was taken. The learned court labored under a clear misapprehension of the testimony. It was undisputed that the arrest was made by a person having no connection whatever with the defendant.

Unwarranted Instruction.

It follows that the judgment should be reversed, and a new trial granted; costs to abide the event. All concur.

NOTE.

Liability of Railroad Company for Illegal Arrest.—A railroad company is liable for a wrongful arrest made by a person in its employ. Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, and *note*. But see Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 26

Am. St. Rep. 539, and *note*; Chicago, etc., R. Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33, and *note*; Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141; Lafitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162. See Mali *v.* Lord, 39 N. Y. 381, 100 Am. Dec. 448.

In Allen *v.* London, etc., R. Co., L. R. 6 Q. B. 65, where a clerk in the service of a railway company, whose duty was limited to issuing tickets to passengers and receiving the money and keeping it in a till under his charge, gave into custody a person whom he suspected of having robbed the till, after the attempt to do so had ceased, it was held that as the arrest could not be necessary for the protection of the company's property he had no implied authority from the company to give such person into custody, and that the company was therefore not liable for his acts. See Paulton *v.* London, etc., R. Co., L. R. 2 Q. B. 534; Edwards *v.* London, etc., R. Co., L. R. 5 C. P. 445.

BRADLEY

v.

SECOND AVE. R. CO.

(*Supreme Court of New York, Appellate Division, First Department, Nov. 11, 1898.*)

Nonsuit—Amendment of Testimony upon Second Trial.—Where a judgment has been reversed for insufficiency of evidence, the case should not be taken from the jury upon the second trial merely because a witness for plaintiff, in the opinion of the court, has amended his testimony to fit the opinion of the general terms upon the previous appeal.

Same—Evidence—Review.—The complaint having been dismissed for insufficiency of evidence, the version of such witnesses' testimony most favorable to plaintiff must be taken by the appellate court.

Accident to Passenger on Street Car Platform—Negligence—Question for Jury.—Plaintiff's intestate was riding upon the front platform of defendant's horse car, with his back against a window, smoking a cigar, when the car, while moving down grade, gave a sudden jerk, which threw him under the wheels, causing his death. A witness, upon the second trial, amending his testimony, said that the jerk was caused by the sudden manner in which the brake was

put on and then let go. *Held*, that whether the accident could have resulted from such cause was a question for the jury.

Same—Contributory Negligence.*—The fact that deceased was riding upon the front platform was not conclusive evidence of contributory negligence, although there was sufficient snow upon the track to make it slippery, it being the custom of defendant to allow smoking upon the front platform.

Same—Question for Jury.—Whether plaintiff had sustained the burden of proving absence of contributory negligence on the part of his intestate was a question for the jury.

Appeal by plaintiff from New York county trial term. *Reversed.*

Argued before VAN BRUNT, P. J., and BARRETT, RUMSEY, MCLAUGHLIN, and INGRAHAM, JJ.

S. B. Stiles, for appellant.
C. F. Brown, for respondent.

Case Stated.

VAN BRUNT, P. J. This action was brought to recover damages for the death of the appellant's intestate through the alleged negligence of the defendant. This case has been previously tried, resulting in a verdict and judgment for the plaintiff, which was reversed by the general term, upon the ground that there was not sufficient evidence of the defendant's negligence, and of the freedom of the plaintiff's intestate from contributory negligence. 90 Hun, 419, 35 N. Y. Supp. 918. The accident which resulted in the death of the plaintiff's intestate occurred on the 25th of January, 1895. He was a passenger upon one of the defendant's horse cars going uptown, boarding the car between Twenty-Sixth and Twenty-Seventh streets. He rode upon the front platform of the car, standing behind the driver on the right side, with his back against the window, and smoking a cigar. When the car reached a point between Sixty-Third and Sixty-Fourth streets, and was going on a slight downgrade, it gave a sudden jerk, and the deceased was thrown over the dashboard, under the wheels of the car, and killed. Upon the previous trial, one James Carroll was a witness, and testified that the jerk was as if the driver had put the brake on, and then let it go, or as if there was a rock or something on the car track,—any-

*See exhaustive *note* entitled "Riding on Platform or Step of Street Car," 7 Am. & Eng. Corp. Cas., N. S., 305 *et seq.*

thing like that. This was the sole evidence on the question of negligence, and the court held upon appeal that it was insufficient to show negligence upon the part of the defendant in the management of its car. There was no evidence whatever that the brake had been suddenly put on; and the testimony was entirely consistent with the assumption that the accident had happened without the brake being put on at all, and hence that there was nothing from which the jury were authorized to impute negligence to the driver of the car. Upon the second trial, the witness Carroll testified that he saw the driver put on the brake as quick as he could, and then all of a sudden let it go again. Another witness, who was not examined upon the previous trial,—a Mr. Allen,—testified that he also saw the driver put the brake on suddenly, and that the plaintiff's intestate was thrown over the dashboard.

Even though the court should be of the opinion that the witness Carroll had amended his testimony to fit the opinion of the general term upon the previous appeal, that fact would not authorize the court in taking the case away from the jury. It was simply a fact to be considered by the jury in weighing his evidence. Williams *v.* Railroad Co., 155 N. Y. 158, 49 N. E. 672. The history of the case cited upon that subject is somewhat instructive, it having been twice to the general term and twice to the court of appeals. 39 Hun, 430; 116 N. Y. 628, 22 N. E. 1117; 92 Hun, 219, 36 N. E. 274; 155 N. Y. 158, 49 N. E. 672. In this case, in addition to Carroll's testimony, we have another witness sworn, who was not examined upon the former trial, and who testifies to the same fact.

Nonsuit—Amendment of Testimony upon Second Trial.

It is urged upon the part of the respondent that Carroll's testimony, taken as a whole, was substantially to the same effect as before; but, as the complaint was dismissed, the most favorable version of his testimony must be taken by the court in considering this appeal.

Same—Evidence—Review.

It is also urged upon the part of the respondent that it was a physical impossibility that the accident could have happened if the brake were suddenly put on and as quickly let go. This is a consideration to be submitted to the jury. They are to judge as to whether there was a sufficient interval between the putting on of the brake and the release of it to throw the plaintiff's intestate over the dashboard, which

Accident to Passenger on Street Car Platform—Negligence—Question for Jury.

seems to have occurred. If there was, upon the part of the driver of the defendant, this sudden and unusual application of the brake, by which the deceased was thrown over the dashboard of the car, it was incumbent upon the defendant to excuse this extraordinary management of the car by showing the existence of some emergency which appeared to require such prompt and decisive action.

The remaining question to be considered is as to whether the plaintiff has sustained the obligation, cast upon him by the law, of showing want of contributory negligence upon the part of his intestate. When the case was before the general term, it appeared that the deceased was standing upon the front platform of the car, without any apparent reason, and that there were considerable accumulations of snow and ice upon the track, which had made it difficult to manage the car. Upon the second trial, however, the evidence tended to show that it had not been snowing much at the time of the accident, and that sufficient snow had not fallen to cause any unusual movements of the car, although everything was somewhat slippery and slushy. It further appears that, at the time of the happening of the accident, the deceased was smoking, and that it was the custom of the defendant to allow smoking upon the front platform. It cannot be held that the mere fact that the deceased was standing upon the front platform is, as matter of law, conclusive evidence of contributory negligence. That depends upon the circumstances of each individual case, and it is a question for the jury to determine whether, from the evidence, any reasonable excuse has been offered. In the case at bar, it appears that it was the custom of the railroad company to allow smoking upon the front platform, and that the deceased was smoking; and the jury had a right to consider all these circumstances, as well as the state of the weather and the condition of the streets, in determining the question as to whether the deceased had been guilty of contributory negligence.

Same—Contributory Negligence.

Question for Jury

Upon the whole case, therefore, we think that the dismissal of the complaint was error, and that the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

OMAHA ST. RY. CO.

v.

EMMINGER.

(*Supreme Court of Nebraska, Dec. 22, 1898.*)

Injury to Passenger—Damages—Evidence.—In the trial of a case for the recovery of damages for personal injuries, it is not improper to permit evidence to be given of complaints by plaintiff of such suffering as would probably be caused by such injury. Following Hewitt *v.* Eisenbart, 55 N. W. 252, 36 Neb. 794.

Same—Same—Medical Attendance.*—When a party is liable for services rendered by a surgeon, he may recover the reasonable value of such services, where they were necessitated by the injuries for the compensation of which he has brought his action, notwithstanding the fact that he has not actually compensated such surgeon. City of Friend *v.* Ingersoll, 58 N. W. 281, 39 Neb. 717, followed.

Same—Contributory Negligence—Instructions.—An instruction that a claimant for damages because of personal injuries, to avoid the imputation of contributory negligence, was required to use only such care as a reasonable and prudent person would exercise under the same circumstances, *held* to excuse an omission to define ordidary care and diligence prescribed, as required in another instruction with reference to contributory negligence.

Same—Future Injuries—Damages.*—Where medical experts had testified to results which would, in their opinion, follow from personal injuries, and with reference to other results which they believed might follow, *held*, not erroneous to instruct the jury that the party injured was entitled to recover damages for such injuries as the jury believed from the evidence such party might labor under in the future as the result of the injuries.

Same—Physical and Mental Pain.*—In an action for the recovery of compensation for damages caused by the infliction of personal injury, plaintiff is entitled to make proof of such physical pain and mental suffering as resulted from the injury. Waterworks Co. *v.* Dougherty, 55 N. W. 1051, 37 Neb. 373, and Harshman *v.* Rose, 69 N. W. 755, 50 Neb. 113, followed.

(Syllabus by the Court.)

*See notes at end of case.

Omaha St. Ry. Co. *v.* Emminger

ERROR by defendant to Douglas county district court. *Affirmed on condition of remittitur.*

John L. Webster, for plaintiff in error.
Weaver & Giller and *F. T. Ransom*, for defendant in error.

RYAN, C. In this case there was a verdict and judgment in the district court of Douglas county in favor of the defendant in error. In the petition in the district court it was alleged that the defendant, a corporation, was on April 8, 1895, operating a line of street railway on Sherman avenue, in the city of Omaha; that plaintiff on said day took passage on one of the cars of the defendant running southward on said avenue, and, before reaching Burdette street, signaled the conductor in charge of said car that she desired to alight at the intersection of Sherman avenue with Burdette street; that the conductor negligently permitted the train of which said car was a part to run beyond Burdette street a distance of about 50 feet before stopping; that the place where said train halted was not a place at which defendant was accustomed to stop; that, within three feet of the rail of the track of defendant furthest west, there was, parallel to it, a ditch about two feet wide and eight feet deep, from which the dirt excavated had been thrown to the westward; that across this ditch there were crossings at intervals to the sidewalk along the west side of Sherman avenue; that the place where plaintiff was compelled to alight was ten or fifteen feet north of the nearest of said crossings, which was a part of an alley; that, when the said train had stopped as indicated, plaintiff attempted to alight from the train, but, before she could do so, the conductor negligently gave the signal for the train to start, and, accordingly, said train was started suddenly, and thereby plaintiff was thrown so that the hindmost wheel of the rear car ran over her right leg, between the knee and the ankle, breaking the bones thereof, and inflicting such a shock upon plaintiff, and so bruising and injuring her, that she was for a long time confined to her bed in a hospital, and has since suffered great pain of body and mind; that her injuries are permanent in their nature; and that she has expended $1,000 in and about the treatment necessitated by her injuries. It was further alleged that the injuries complained of were imputable entirely to the negligence of the street-railway company, its agents and employees; and the prayer was for judgment for the sum of $26,000 and costs. The answer contained an admission that

Case Stated.

the defendant was a corporation engaged in the operation of a street railway in Omaha, and was a common carrier of passengers for hire, and a denial of every other averment of the petition, with an affirmative allegation that whatever injury plaintiff suffered was chargeable entirely to her own negligence. This last averment was denied in a reply.

On the trial there was an irreconcilable conflict in the evidence with respect to three propositions. Of these, the first was as to the place where plaintiff was compelled to alight from the car; the second was as to whether or not she had, in fact, alighted when the car started forward; and the third was whether or not, after safely alighting on the crossing, she negligently placed herself in such a position that, of necessity, she was struck by the train when it started forward. Upon all these propositions the evidence was so conflicting that different minds might reasonably reach different conclusions, and the verdict of the jury settled them beyond question in error proceedings. Waterworks Co. *v* Dougherty, 37 Neb. 373, 55 N. W. 1051; Association *v.* Shryock, 54 Neb. 250, 74 N. W. 607; Railway Co. *v.* Brady, 39 Neb. 27, 57 N. W. 767; Railway Co. *v.* Clarke, 39 Neb. 65, 67 N. W. 545; Railway Co. *v.* Craig, 39 Neb. 601, 58 N. W. 209; Railway Co. *v.* Morgan, 40 Neb. 604, 59 N. W. 81; Railway Co. *v.* Cameron, 43 Neb. 297, 61 N. W. 606; Spears *v.* Railroad Co., 43 Neb. 720, 62 N. W. 68; Railroad Co. *v.* Metcalf, 44 Neb. 848, 63 N. W. 51; Miller *v.* Strivens, 48 Neb. 458, 67 N. W. 458.

It is complained by plaintiff in error that it was improper to permit evidence to be given as to the distance the street car ran before halting to permit assistance to be rendered defendant in error after she had been injured. There was presented by the plaintiff the theory that the train was started so suddenly that she was thereby thrown to the earth. The evidence as to the distance attained by the train before it stopped was admitted on the assumption that this fact might throw light upon the question of the speed with which the train resumed its course. In this we cannot say there was error. Incidentally, this evidence might develop the fact that the conductor evinced but little of the interest which should influence a person of humane instincts: but this, if it existed, was something which ought not to exclude evidence to which the defendant in error was entitled.

In respect to the complaint that the mother of the defendant in error testified that said defendant in error complained

of severe pains in her sides, head, and back, and of sleeplessness and want of appetite, it is only necessary to refer to Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252; for the testimony of expert witnesses was to the effect that such results, it was inferable, would follow the shock sustained by the defendant in error. Under these conditions, it was, moreover, proper that the defendant in error should testify, as she did, to the pains, sleeplessness, and want of appetite of which she had complained to her mother.

Injury to Passenger—Damages—Evidence—

It is not insisted that ordinarily there would be error in exhibiting to a jury a limb injured as this had been; but it is said it was improper in this instance, for the reason that the defendant in error, a female, was young, handsome, and attractive, and, consequently that the sympathies of a jury composed of men were unduly excited in her behalf. The motto on the coat of arms in this state is, "Equality before the law." The defendant in error suffered injuries for which she sought compensation in damages, and she was entitled, in sustaining her claim, to resort to the same proofs that she might have resorted to if she had been aged, ugly, and repulsive.

It is urged that the defendant in error made no proof that she was liable for, or that she had paid, the bill of the surgeons who had rendered services in her behalf. This liability is to be presumed from the facts that she had attained her majority before the services were rendered, and that they were necessary, and the case therefore falls within the principle stated in City of Friend *v.* Ingersoll, 39 Neb. 717, 58 N. W. 281, and Machine Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934.

Same—Same—Medical Attendance.

It is complained that, at the request of defendant in error, an instruction was given by the terms of which, to entitle her to recover, she was required to have exercised ordinary care and diligence, and such care and diligence were not defined. We do not think the omission of this definition could have left the jury in doubt on this point, in view of the sixth instruction given by the court on its own motion, which was as follows: "You are instructed that it is the duty of plaintiff, in alighting from the car, after it had stopped, to use only such care as a reasonable and prudent person would exercise under the same circumstances."

Same—Contributory Negligence—Instructions.

It is insisted that there was error in giving the jury an in-

struction in effect that, if the finding was for the plaintiff as to the right to recover, the recovery should be of such damages as the evidence showed she had sustained, not in excess of the amount claimed in the petition. We have not been able to understand the theory upon which the argument is made that this left an uncontrolled discretion in the jury to find whatever amount of damages the jurors saw fit. The expert surgical witnesses had testified that, in their opinions, the injury had left the limb in such condition that a very slight bruise might cause a desquamation of the tibia at one place; that the limb was not, and probably never would be, as large, as strong, or of the same length that normally it should be; and they further testified that the nervous complications caused by the shock might be permanent. It was therefore proper for the court to instruct the jury, as was done, that the defendant in error was entitled to recover damages for such injuries as the jury believed from the evidence the defendant in error might labor under in the future as the result of her injuries.

Same—Future Injuries—Damages.

It is urged that there was error in an instruction that there might be a recovery for physical pain and mental suffering if the proofs showed that the street-railway company was liable for damages. This is settled adversely to the contention of plaintiff in error in Waterworks Co. *v.* Dougherty, *supra*, and in Harshman *v.* Rose, 50 Neb. 113, 69 N. W. 755.

Same—Physical and Mental Pain.

In support of a motion for a new trial, there were submitted various affidavits as to what could be shown on a future trial, if one should be allowed. Some of these were of evidence merely cumulative; others were to the effect that defendant in error, a short time before the trial, was present at a ball and danced; but it was shown that the dancing was of a sort that did not require that a participant should not be a cripple, and even this dancing caused defendant in error such pain that she very soon desisted. There was therefore no abuse of discretion in overruling this motion. Davis *v.* State, 51 Neb. 307, 70 N. W. 984.

Upon a very full consideration of all the evidence as to the extent and nature of the injuries from which the defendant in error has suffered in the past, and is likely to suffer in the future, we have concluded that the judgment may be affirmed to the extent of $5,000. If is therefore ordered that if, within 40 days from the filing of this opinion, the defendant in error shall file in this court a *remittitur* in the sum of $5,080 as of

the date of said judgment, it will be affirmed for the balance; otherwise the entire judgment will be reversed, and the cause will be remanded for a new trial.

NOTES.

Actions for Personal Injuries—Future Pain and Suffering as an Element of Damage.—In actions for personal injuries there may be a recovery on account of the physical suffering which the evidence shows the injured party will endure in the future.

United States.—Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571; Union Pac. R. Co. *v.* Jones, 49 Fed. Rep. 343; Illinois Cent. R. Co. *v.* Davidson, 76 Fed. Rep. 517.

Alabama.—See South, etc., Alabama R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.—St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Georgia.—Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259.

Illinois.—Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641; Consolidated Coal Co. *v.* Haenni, 146 Ill. 614; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

Michigan.—Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374.

Minnesota.—Johnson *v.* Northern Pac. R. Co., 47 Minn. 430.

Missouri.—See Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

New York.—Miller *v.* Fort Lee Park, etc., Co., 73 Hun (N. Y.) 150; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Kane *v.* New York, etc., R. Co., 132 N. Y. 160; Koetter *v.* Manhattan R. Co., 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611.

Pennsylvania.—Smith *v.* East Mauch Chunk, 3 Pa. Super Ct. Rep. 495.

Texas.—Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653.

Wisconsin.—Kleigel *v.* Aitken, 94 Wis. 432; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106; Nichols *v.* Brabazon, 94 Wis. 549.

Same—Bodily Pain and Suffering as an Element of Damages.—In actions for personal injuries the physical pain and suffering endured by the injured person is an important element of damage.

England.—Phillips *v.* London, etc., R. Co., 5 Q. B. Div. 78.

United States.—Saldana *v.* Galveston, etc., R. Co., 43 Fed. Rep. 862; Davidson *v.* Southern Pac. Co., 44 Fed. Rep. 476; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 546; Union Pac. R. Co. *v.* Jones, 49 Fed. Rep. 343.

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Alabama.—South, etc., Alabama R. Co. *v.* McLendon, 63 Ala. 266; Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 30 Am. St. Rep. 65; Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645; Alabama G. S. R. Co. *v.* Burgess, (Ala. 1897) 22 So. Rep. 169.

Arkansas.—St. Louis, etc., R. Co. *v.* Blackburn (Ark. 1891) 15 S. W. Rep. 469; St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481.

Connecticut.—Ashcroft *v.* Chapman, 38 Conn. 230.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Georgia.—Richmond, etc., R. Co. *v.* Williams, 88 Ga. 16.

Illinois.—Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641; Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33; Central R. Co. *v.* Serfass, 153 Ill. 379, *affirmed* 53 Ill. App. 448; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

Indiana.—Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317.

Iowa.—Morris *v.* Chicago, etc., R. Co., 45 Iowa 29; Deppe *v.* Chicago, etc., R. Co., 38 Iowa 592; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462; Moore *v.* Central R. Co., 47 Iowa 688.

Kansas.—Abilene *v.* Wright, 4 Kan. App. 708.

Louisiana.—Donnell *v.* Sandford, 11 La. Ann. 645.

Maine.—Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Blackman *v.* Gardiner, etc., Bridge, 75 Me. 214.

Maryland.—Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Pittsburg, etc., R. Co. *v.* Andrews; 39 Md. 329.

Massachusetts.—Smith *v.* Holcomb, 99 Mass. 552.

Michigan.—Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374.

Minnesota.—Johnson *v.* Northern Pac. R. Co., 47 Minn. 430.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.—Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323.

Montana.—Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334.

Nevada.—Johnson *v.* Wells, etc., Co., 6 Nev. 224, 3 Am. Rep. 245.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New Jersey.—Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.—Koetter *v.* Manhattan R. Co., 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123; Miller *v.* Fort Lee Park, etc., Co., 73 Hun (N. Y.) 150; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Ransom *v.* New York, etc., R. Co., 15 N. Y. 415; Kane *v.* New York,

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etc., R. Co., 132 N. Y. 160; Larkin *v.* New York, etc., R. Co., (C. Pl.) 19 N. Y. Supp. 479; Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260; Morse *v.* Auburn, etc., R. Co., 10 Barb. (N. Y.) 621; Filer *v.* New York Cent. R. Co., 49 N. Y. 42, 10 Am. Rep. 327; Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25; Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46.

North Carolina.—Wallace *v.* Western North Carolina R. Co., 104 N. Car. 442.

Pennsylvania.—Pittsburg, etc., Pass. R. Co. *v.* Donahue, 70 Pa. St. 119; Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 27; Pennsylvania R. Co. *v.* Allen, 53 Pa. St. 276; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Breary *v.* Philadelphia Traction Co., 5 Pa. Dist. Rep. 95.

Texas.—Gulf, etc., R. Co. *v.* Glenk, 9 Tex. Civ. App. 599; Gulf, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; Missouri, etc., R. Co. *v.* McElree, (Tex. Civ. App. 1897) 41 S. W. Rep. 843; San Antonio, etc., R. Co. *v.* Keller, 11 Tex. Civ. App. 569; Galveston, etc., R. Co. *v.* Waldo, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653.

Utah.—Giblin *v.* McIntyre, 2 Utah 384.

Vermont.—Bovee *v.* Daniel, 53 Vt. 183.

Washington.—Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46.

Wisconsin.—Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106.

Recovery of Medical Expenses, Nursing, etc.—In order that plaintiff, in an action to recover for personal injuries, shall be entitled to recover for expenses incurred in the way of physician's or surgeon's fees, medicines, medical attendance and nursing, it is not necessary that such amounts should have been actually paid, provided the plaintiff has rendered himself liable to pay the same. Dixon *v.* Bell, 1 Stark. 287, 2 E. C. L. 114; Consolidated Coal Co. *v.* Scheiber, 65 Ill. App. 304; Chicago *v.* Honey, 10 Ill. App. 538; Mueller *v.* Kuhn, 59 Ill. App. 353; Varnham *v.* Council Bluffs, 52 Iowa 698; Abilene *v.* Wright, 4 Kan. App. 708; Lacas *v.* Detroit City R. Co., 92 Mich. 412; Minneapolis Threshing-Mach. Co. *v.* Regier, 51 Neb. 402; Friend *v.* Ingersoll, 39 Neb. 717; Reynolds *v.* Niagara Falls, 81 Hun (N. Y.) 353; Chacey *v.* Fargo, 5 N. Dak. 173; Lutcher, etc., Lumber Co. *v.* Lyson, (Tex. Civ. App. 1895) 30 S. W. Rep. 61; Wilson *v.* Southern Pac. Co., 13 Utah 352.

Nursing by Members of Plaintiff's Family.—The plaintiff in an action for damages for personal injuries cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children

in ministering to his needs involves only, it is said, the performance of the ordinary offices of affection which is their duty. Such services involve no liability on the part of the plaintiff, and, therefore, afford no basis for a claim against the defendant, as for expenses incurred. A man may hire his own adult children to nurse him in an illnesss caused by personal injuries, or to treat him therefor, in the same manner and with the same effect that he may hire other persons, but in the absence of an express contract the law will not presume one, so long as the family relation continues. WILLIAMS, J., in Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1. And see Peoria, etc., R. Co. *v.* Johns, 43 Ill. App. 83.

RUDIGER

v.

CHICAGO, ST. P., M. & O. RY. CO.*

(*Supreme Court of Wisconsin, Nov. 22, 1898.*)

Evidence.—Defendant was not prejudiced by the admission in evidence of a model giving a false idea of the *locus in quo*, accurate maps and photographs of the scene having also been introduced in evidence.

Same.—The testimony of a witness merely introducing a collateral issue, and prejudicial to defendant, was inadmissible.

Remarks of Counsel—Ground for Reversal.†—Where it is evident that remarks of counsel in the presence of the jury are designed to inflame the passions of the jury to the prejudice of defendant's case, a mere ruling that the jury should disregard such remarks does not cure the evil; and where plaintiff's counsel continued to state through the trial that defendant's witnesses were "ghouls" and "vultures" "prowling among the cots in the hospital;" and that defendant's claim agent was tampering with plaintiff's witnesses, etc., such conduct is sufficient ground for reversal.

Special Verdicts.—Deceased was a passenger on a train which arrived at a point near where a wrecked and burning car containing an oil tank was on the track. The passengers left the train, and were directed to remain at a certain point; and deceased was

*For former report, see 6 Am. & Eng. R. Cas., N. S., 50.

†See note at end of case.

subsequently injured by the explosion of the oil tank, and died from the injury. It was urged that the special verdict did not cover the controverted issues. *Held*, that the question whether deceased was at a certain point when the explosion occurred should have been submitted for the determination of the jury, as requested, it being a vital question in the case and properly an issue.

Case at Bar.—Where the testimony of the only witness supporting plaintiff's side of a vital question is impeached by the surrounding circumstances, and is improbable on its face, and is directly contradicted by the testimony of several witnesses, a verdict for plaintiff should be reversed.

Excessive Damages.—In an action by the widow of the deceased, it merely appeared that he was a farmer, 65 years of age, robust and healthy; that he had seven children living, all married; that a son lived with him, and their joint annual earnings were about $800; and that plaintiff was 64 years of age, and lived with deceased. *Held*, that a verdict for $4,000 was excessive.

Elements of Damage.*—The recovery should have been limited to such sum as, being put to interest, would each year, by taking part of the principal and adding to the interest, yield an amount sufficient for the widow's support during the time deceased would probably have lived, together with such other sum as the evidence showed there was reasonable expectation she would receive from his earnings, damages to the amount of the pecuniary loss being all that is recoverable under the statute.

APPEAL by defendant from Dunn county circuit court. *Reversed.*

Case Stated.

The circumstances out of which the cause of action set out in the complaint arose are the same as those mentioned in 96 Wis. 243, 70 N. W. 486; 25 C. C. A. 486, 80 Fed. 361; and 28 C. C. A. 358, 83 Fed. 437. Early in the morning of September 15, 1894, a western-bound freight train on defendant's road was wrecked at a point in St. Croix county, between Hammond and Roberts stations. Several cars (one loaded with coke, two containing naptha in metal tanks, and one containing kerosene oil in a metal tank) and the caboose became separated from the rest of the train and derailed. The forward car, containing naphtha, caught fire and exploded soon after the wreck, setting fire to the remaining cars. The fire continued to burn for some hours, and until about 11 o'clock, when the tank con-

*See note at end of case.

taining kerosene oil exploded, and threw the burning oil on plaintiff's intestate, causing injuries from which he died. On the morning of that day, Mr. Rudiger, the decedent, purchased a ticket at St. Paul, and boarded one of defendant's passenger trains, bound for Menomonie, Wis. The train arrived at the scene of the wreck about 10 o'clock, and was stopped some little distance west of the burning cars. A gap was opened in the right of way fence on the south side, some 258 feet west of the burning tank; and the passengers, together with the mail, express matter, and baggage, were transferred through the fields, south, to another gap in the fence, 256 feet east of the tank. The mail matter was deposited on the right of way, near the track, north and a few feet westerly of the west post of the east gap, and the express and baggage extended easterly for a distance of some 40 feet or more. Mr.Rudiger followed the other passengers to the east gap. No specific directions were given the passengers as to where they should stay. The burning tank attracted considerable attention, and some of the passengers went westerly on the right of way, past the gap, towards the car. The fire was burning with great violence, producing a loud, roaring noise, with flames shooting up. The injury complained of occurred about an hour after the passenger train arrived. At the time of the explosion of the oil tank which caused the injuries to Mr. Rudiger, the great body of the passengers were standing around and easterly of the east gap. The plaintiff insists that at the time of the explosion Mr. Rudiger was standing near the baggage, at a point a little east of the west post of the gap; that when the tank exploded the burning oil was thrown upon him, inflicting injuries which occasioned his death. The location of Rudiger was denied by defendant, and its testimony tended to show that he was some distance west of the gap, towards the tank, on the right of way. A special verdict was taken, in which the jury found, in substance, that the defendant was guilty of a want of ordinary care, in selecting the place it did for its temporary station, which was the proximate cause of the injuries to Rudiger; that Rudiger was at the temporary station at the time he received his injuries, and not west of the gap; that he was not guilty of any want of ordinary care which contributed to his injuries; and that the plaintiff's loss was $4,000. A motion to set aside the verdict was denied, and judgment entered thereon. The defendant appeals. Defendant assigns error as to the admission of testimony,

remarks of counsel during the trial, imperfections in the verdict submitted, and excessive damages, all of which are noticed in the opinion, and do not require statement.

L. K. Luse and *H. H. Hoyden*, for appellant.

J. R. Mathews, *T. F. Frawley*, and *C. T. Bundy*, for repondent.

BARDEEN, J. (after stating the facts.) The errors assigned, and which we feel called upon to consider, are as follows: (1) improper admission of evidence; (2) improper remarks of counsel for plaintiff; (3) failure of the special verdict to cover all the issues in the case; (4) refusal of the court to set aside the verdict.

1. Numerous objections were made to testimony offered by the plaintiff, but only such as are herein mentioned are deemed to be of sufficient importance to require notice. A wooden model, purporting to have been made on a scale, and representing the track and right of way between the gaps in the fence, was presented by the plaintiff, and offered and received in evidence. This was objected to as being inaccurate and deceptive,—as giving a false idea of the *locus in quo*. The model was made by a person who had never been on the ground, and from figures, as to heights and distances, which were afterwards demonstrated to be liitle more than estimated. Except for the fact that maps and photographs of the scene were presented, and accurate measurements of distances and of the height of surrounding objects submitted, we should be inclined to hold that the model was so inaccurate as to be inadmissible. As it appears to us now, the evidence as to those matters was so definite and positive that we cannot believe the jury were deceived by the model. One of the serious questions litigated on this trial was as to the exact location of Rudiger at the time of the explosion. The plaintiff insisted that he was standing by the baggage, east of the west post of the gap, while the defendant insisted that he was west of the gap. One Levi W. Meyers was produced as a witness for plaintiff, and was asked the following questions: "Where were you standing at the time you received the injuries apparent on you, with reference to the east gap?" This was objected to, "unless the witness proposes to testify with regard to the injuries to Mr. Rudiger or to Mr. Rudiger's whereabouts." The objection was overruled, and the witness answered: "It is a question whether I was standing or

Evidence.

Same.

running at the time I was struck. At the time I first noticed the explosion, I was standing just back of the mail matter. I mean southwest. Q. Where were you, with reference to an imaginary line drawn from the west line of the east gap to the mail matter? A. I think perhaps I was a few feet—maybe four or five feet—west of it." Witness was one of the few who was severely injured by this explosion. He then had a suit pending against the defendant. The question in no way identified the witness with reference to Rudiger. At no place in his testimony does he attempt to locate Rudiger at the time of the explosion. His location was some distance west of where it is claimed Mr. Rudiger stood. His answers in no way tended to help the jury in the all-important inquiry as to Rudiger's position. On the contrary, they introduced a collateral issue, prejudicial to defendant, and were sufficiently flagrant to come within the rule of condemnation laid down by this court in Colf *v.* Railway Co., 87 Wis. 273, 58 N. W. 408.

2. During the trial, and in the course of the argument of the case to the jury, numerous exceptions were taken to the remarks of plaintiff's counsel in the presence of the jury deemed to be prejudicial to the defendant's interests. In some instances the court ruled the remarks improper, and directed the jury to disregard them, and in others simply passed them without ruling. The general tendency of the objectionable remarks was to inflame the minds of the jury, and to create sympathy for the plaintiff and prejudice and resentment towards the defendant. Some allowance must always be made for the zeal of counsel, but when it is evident that there is a design to stir up resentment in the minds of the jury, to arouse their passions and sympathies, and to discredit and prejudice the defendant's case, a mere ruling that the jury should disregard the objectionable remarks does not cure the evil. The circumstances of this accident were especially distressing and deplorable. Mr. Rudiger was so severely burned that death ensued. Several of the witnesses on the trial were dreadfully burned and disfigured. The conditions were such that insinuations of bad faith, charges that defendant's witnesses were "ghouls" and "vultures" "prowling among the cots in the hospital," that defendant's claim agent was tampering with plaintiff's witnesses, and that other witnesses were there, violating confidential relations, were well calculated to create unfavorable impressions, against which the defendant was

Remarks of Counsel—Ground for Reversal.

powerless. The poison was there, and the ruling of the court would not be a sufficient antidote. Defendant's alleged negligence was not so palpable, nor the circumstances so desperate, as to warrant any such procedure. As remarked by the court in Brown *v.* Swineford, 44 Wis. 283 : "Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence. But it is not at all certain that a jury will do so. Verdicts are too often found against evidence, and without evidence, to warrant so great a reliance on the discrimination of juries. * * * It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client, but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. * * * And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or a reversal in this court." See, also, Friemark *v.* Rosenkrans, 81 Wis. 359, 51 N. W. 557 ; Andrews *v.* Railroad Co., 96 Wis. 348, 71 N. W. 372. The nature of the case, and the circumstances surrounding the alleged accident, were such as to make the remarks of counsel referred to harmful in the extreme, continued as they were through the trial ; and we should feel compelled to reverse the judgment on that ground alone, if other errors had not been deemed sufficient.

3. It is urged with great earnestness that the special verdict does not cover the controverted issues in the case, in that there is no finding as to the limits of the temporary station provided by the defendant. Resort must be had to the pleadings to discover the real points at issue. The complaint alleged that the passengers were conducted around the wreck, and directed to "remain and wait at the point on the right of way of defendant where the said mail, baggage, and express had been deposited." The complaint further says that deceased went to the temporary station designated, and waited on the right of way where said baggage had been deposited, and while waiting at that place was injured. The answer meets these allegations by saying that defendant transferred the mail, express, and baggage to the east of the wreck, and deposited it on the right of way, 260 to 300 feet east of the burning tank, "the baggage being placed furthest east and east of said east gap, and also directed the passengers, including plaintiff's intestate, to pro- Special Verdicts.

ceed to said point on the right of way where said baggage had been so deposited and there wait the arrival of the train from the east." There is no proof in the case that defendant's employees gave any specific directions to passengers as to the exact place where they were to wait. The only proof on the subject is the inference to be drawn from the fact that they opened a gap in the fence, transferred the mail, express, and baggage, and deposited the same on the right of way north of the gap, and conducted the passengers through the field and through the gap on to the right of way to the east. Admitting for the purpose of the discussion that the complaint and answer form an issue as to the western limits of the temporary station, there was no request that it be submitted to the jury, and it was not so submitted. Defendant prepared a list of 12 questions to be submitted as a special verdict, but it contains nothing bearing upon this point. There is nothing in the requests to charge the jury, handed up by the defendant, that calls attention to any such issue. One of such requests given by the court is as follows: "The complaint alleges that a temporary station was selected by the defendant's officers and servants, where the baggage, mail, and express was deposited on defendant's right of way, and that Leopold Rudiger, deceased, went to and remained at that place by direction of the defendant. Under this allegation the plaintiff cannot claim, nor are you at liberty to find, that Mr. Rudiger was justified or excusable in going further west, towards the burning tank." Another request was to the effect that, the defendant having opened gaps in the fence on each side of the wreck, a considerable distance therefrom, it was notice to Rudiger that the space inside of the right of way between the gaps was either considered dangerous, or for some reason the company desired passengers to keep outside that space, and that if Rudiger went west of the east gap upon the right of way, towards the burning tank, and was injured, he assumed the risk. Upon his own motion, the court told the jury that no portion of the right of way west of the east gap could be considered to be a part of the temporary station. The evidence as to what was said to passengers, and as to what was done in opening the gaps and transferring them around the wreck, is not in dispute. Under the circumstances, the court had a right to assume that the western line of the temporary station was the westerly side of the gap, and it was not error not to require a finding on that point. In view of the evidence offered, we think the court should have submitted one of the

questions requested. Question 4 submitted reads, "Was Leopold Rudiger, at the time of receiving his injuries, west of the east gap?" Question 4 requested is, "Was Leopold Rudiger on the right of way west of the east gap at the time of the explosion?" All of the witnesses who testify on the subject say that a sufficient time elapsed between the warning of the explosion and the time when the fire reached them for them to have gone some little distance. It also appears that everybody ran. It might be that Rudiger was east of the gap when he received his injuries, and west of the gap when the explosion occurred. At any rate the contest was so close that the question requested should have been submitted.

4. A vital question in this case was as to the location of Mr. Rudiger at the time of his injury. The jury found that he was not west of the east gap. The only witness for plaintiff who testified as to his whereabouts about the time of the explosion was one J. W. Gardner who claims he was seated on the right of way fence, immediately south of the burning tank. He says: "At the time I was thus seated on the fence, I saw Mr. Rudiger. He was down near where they unloaded some trunks,—where they unloaded the baggage. That was about north of the east gap; maybe a little east of it. * * * It was a minute and a half or two minutes from the time I saw Mr. Rudiger by the baggage to the time of the explosion,—a short time before." Without this testimony, a verdict for plaintiff could not stand for a moment. Let us consider the probability of the truth of this statement. He had never seen Mr. Rudiger before that day, and never saw him afterwards. About four or five minutes before the explosion he saw him with Mr. Bellewith at the culvert, about 140 feet east of the gap. He then went back to the wreck. At the time he saw deceased standing by the baggage, he was at least 250 feet distant. There were a large number of people there. The great mass of passengers were around the east gap, yet this witness was able to identify Mr. Rudiger from the number, and locate him near the baggage. In addition, the witness about 2 years after the accident readily identified Mr. Rudiger's photograph, which had been taken some 16 years before the accident. Soon after the accident, Dr. Boothby attended witness and dressed his burns. To him witness stated that he was standing in the field, about a rod from the fence, at the time of the explosion. He afterwards signed a written statement to that effect. Witness denied ever making the

Case at Bar.

admission to the doctor, and denied signing the written statement. His testimony is impeached by the surrounding circumstances, and is improbable on its face. But, as opposed to his statements, the overwhelming evidence of the defendant locates Mr. Rudiger some distance west of the east gap at the time of the explosion. The testimony of Judge Dickey, Bellewith, Brooks, and Mrs. Patrick locates him several rods west of the gap. The undisputed testimony shows that neither the fence nor grass was burned east of the burning tank to a greater distance than 117 feet. Of 40 or 50 persons standing around the east gap,not another one was severely burned. The great weight of the testimony, together with the probabilites of the case, is strongly with the defendant. A verdict so plainly against the preponderance of the evidence,should not be permitted to stand.

The jury fixed the plaintiff's damages at $4,000. This is claimed to be excessive. Deceased was a farmer, 65 years of age, robust and healthy. The plaintiff was 64. He had seven children living, all married. A son lived with him, and worked on the farm. The product of their joint earnings was about $800 annually. No proof was given as to their expenses, or how much of the income from the farm was contributed to plaintiff's support. Neither was any testimony given as to the value of such support, or as to their domestic relations, or of any fact or circumstance upon which to base expectation of the widow's ultimately receiving a share of his earnings as his heir, other than that they were husband and wife, and lived together. Decedent's expectation of life was between 10 and 11 years. Under the statute (section 4256, Rev. St. 1878) the jury were at liberty to give "such damages, not exceeding five thousand dollars, as they should deem fair and just in reference to the pecuniary injury from such death to the relatives [in this case, to the widow] of the deceased." Schadewald *v.* Railway Co., 55 Wis. 569, 13 N. W. 458. In fixing such damages the jury should include the value of her support and protection by the deceased during the time he would probably have lived. They should also consider the addition that the earnings of deceased would probably have made to his property, had he continued to live, and the reasonable expectation which plaintiff had of pecuniary advantage by ultimately receiving a share of such earnings, as one of his heirs; and damages may be given with respect to that expectation being disappointed, and the probable loss

Excessive Damages.

resulting therefrom. Castello *v.* Landwehr, 28 Wis. 522; Lawson *v.* Railway Co., 64 Wis. 447, 24 N. W. 618; Kaspari *v.* Marsh, 74 Wis. 562, 43 N. W. 368. In Regan *v.* Railway Co., 51 Wis. 599, 8 N. W. 292, this court held that a complaint which failed to state facts showing pecuniary loss, present or prospective, resulting from the death, to the widow of deceased, was bad on demurrer. It was further stated that under this statute it was only for a pecuniary loss that the action is maintainable, and not for loss of society, or damages in the way of *solatium*. Not only must such issuable facts be stated, but, to warrant a recovery, there must be proof to sustain them. The jury are not warranted in giving damages not founded upon testimony, nor can they go beyond the measure of compensation for the injury. They cannot give damages founded on their fancy, or based upon visionary estimates of probabilities or chances. They must be confined to those damages which are capable of being measured by a pecuniary standard. Cooper *v.* Railway Co., 66 Mich. 271, 33 N. W. 306; Balch *v.* Railroad Co., 67 Mich. 394, 34 N. W. 884. Tested by these rules, the recovery in this action cannot be supported. In all human probability, the earning capacity of deceased would decrease as he advanced in years. The amount found by the jury would about cover his gross earnings during his expectancy of life making no allowance for expenses of living and support in the meantime. The recovery should be limited to such sum as, being put to interest, will each year, by taking a part of the principal and adding to the interest, yield an amount sufficient for her support during the time deceased would probably have lived, together with such other sum as the evidence showed there was reasonable expectation she would receive from his earnings. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Elements of Damages.

NOTES.

Arguments of Counsel—Ground for Reversal.—If counsel, in argument to the jury, repeatedly makes improper remarks prejudicial to the interests of the adverse party, and the verdict may have been procured by reason of such remarks, a new trial should be granted. Huckell *v.* McCoy, 38 Kan. 53; Brown *v.* Swineford, 44 Wis. 282;

Notes

Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114; Bullard *v.* Baltimore, etc., R. Co., 64 N. H. 27; Cleveland Paper Co. *v.* Banks, 15 Neb. 20; Hall *v.* Wolff, 61 Iowa 559; Henry *v.* Sioux City, etc., R. Co., 70 Iowa 233; Campbell *v.* Maher, 105 Ind. 383; Bedford *v.* Penny, 58 Mich. 424; Union Cent. Ins. Co. *v.* Cheever, 36 Ohio St. 201; Cook *v.* Ritter, 4 E. D. Smith (N. Y.) 253; Lloyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Read *v.* State, 2 Ind. 438; Walker *v.* State, 6 Blackf. (Ind.) 1; State *v.* Lee, 66 Mo. 165.

The misconduct of counsel in argument, in order to warrant a reversal, must be of such a nature as to injure the opposite party. Alabama, G. S. R. Co. *v.* Carroll (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759; Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. Rep. 68; Houston & T. C. R. Co. *v.* Nichols (Tex.), 9 Am. & Eng. R. Cas. 361; Shular *v.* State, 105 Ind. 289; Combs *v.* State, 75 Ind. 215; Morrison *v.* State, 76 Ind. 335; Epps *v.* State, 102 Ind. 539; Anderson *v.* State, 104 Ind. 467; Railroad *v.* Gurley, 12 Lea (Tenn.) 46; Hinton *v.* Cream City R. Co., 65 Wis. 323; Porter *v.* Throop, 47 Mich. 313; State *v.* Abrams, 11 Oreg. 169; State *v.* McCoot, 34 Kan. 613; Henry *v.* Sioux City, etc., R. Co., 70 Iowa 233; Sunberg *v.* Babcock, 66 Iowa 515; Hammond *v.* Sioux City, etc., R. Co., 49 Iowa 450; State *v.* Underwood, 77 N. Car. 502; Winter *v.* Sass, 19 Kan. 566.

But it must clearly appear that the line of argument was unwarranted. Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32; Miller *v.* Brown (Iowa, 1889), 42 N. W. Rep. 561. And see also on the general subject, Newton *v.* State, 21 Fla. 53; Angelo *v.* People, 69 Ill. 209, 36 Am. Rep. 132; Martin *v.* State, 63 Miss. 505; Laubach *v.* State, 12 Tex. App. 583; State *v.* Ryan, 70 Iowa 154; Scott *v.* State, 7 Lea (Tenn.) 232; State *v.* Guy, 69 Mo. 430; State *v.* Braswell, 82 N. Car. 693; State *v.* Balch, 31 Kan. 465; Stancell *v.* Kenan, 33 Ga. 56; Long *v.* State, 56 Ind. 182.

And such remarks, to afford ground for a new trial, must have been objected to when made. Skaggs *v.* Given, 29 Mo. App. 612; Huckell *v.* McCoy, 38 Kan. 53; Ross *v.* Davenport, 66 Iowa 548; Powers *v.* Mitchell, 77 Me. 361; St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566; Chandler *v.* Thompson, 30 Fed. Rep. 38; Muirhead *v.* Hannibal, etc., R. Co., 31 Mo. App. 578; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; Brennan *v.* St. Louis (Mo. 1886), 2 S. W. Rep. 481; Morrison *v.* State, 76 Ind. 335; Choen *v.* State, 85 Ind. 209; Turner *v.* State, 70 Ga. 765.

Death by Wrongful Act — Damages.— See Walker *v.* McNeill (Wash.), 11 Am. & Eng. R. Cas., N. S., 738, and extensive *note*, p. 750 *et seq.*

MISSOURI, K. & T. RY. CO. OF TEXAS

v.

OVERFIELD.

(*Court of Civil Appeals of Texas, Oct. 19, 1898.*)

Injury to Passenger while Alighting—Train Stopped on Trestle—Pleading.—It was alleged in the complaint that plaintiff was a passenger on defendant's train; that the porter having announced its arrival at a station, and plaintiff thinking it had been stopped at the depot, it being dark, fell from the trestle upon which the train had been brought to a stand, while attempting to alight, and was injured; and that his injury was the result of defendant's negligence. *Held*, that such complaint was not demurrable because it did not expressly state which act, or acts, of defendant were negligent.

Right of Passenger to Alight at Intermediate Station.*—A passenger alighting at an intermediate station remains a passenger, so long as his object in getting off the train is not inconsistent with the character of passenger, he, as a passenger, having the privilege of alighting for other purposes than those connected with his journey.

Same—Pleading.—And the complaint was not demurrable because it did not state plaintiff's object in attempting to alight at such station.

APPEAL by defendant from Bexar county district court. *Affirmed.*

F. C. Davis and *Floyd McGowan*, for appellant.
Summerlin & Walling and *Ed. Haltom*, for appellee.

JAMES, C. J. Plaintiff made the following allegations, in substance: That he took passage on appellant's train at Taylor for Greenville, Tex., which route carried him through the town of Temple. That, on approaching Temple, appellant's porter called out "Temple," and opened the door to allow passengers to get on or off, and thereupon the train stopped; and plaintiff, being thereby led to believe that the train was at the station, got off, as he supposed, upon the platform, when in fact the train had not

Case Stated.

*See Alabama G. S. Ry. Co. *v.* Coggins, *ante*, and *note*.

reached the station, but had stopped on a trestle; and it being nighttime, and there being no lights, plaintiff, although exercising due care at the time, stepped out and fell into an excavation containing water, whereby he sustained bodily injuries, and all his clothing became drenched. That it was in January. That the car had been allowed to get cold, and his having to continue his journey under such conditions to his destination resulted in his severe sickness and permanent disability, for all of which he prayed damages. He alleged that he complained to the conductor of his drenched and cold condition, stating that he feared it would make him sick, and asked to be permitted to stop off until the next train, which was refused, and plaintiff, being without means to procure another ticket, was compelled to prosecute his journey. The petition alleged also that his injuries, which were set forth with detail, were caused by the negligence of defendant. He alleged that he desired to "temporarily leave said car at Temple," as his reason for attempting to do so. To the petition, defendant demurred, and here contends that it does not appear therein that defendant owed plaintiff any duty with reference to the station of Temple, in that it does not allege that plaintiff notified defendant's employees that he desired to get off at Temple, an intermediate station, and because it did not allege that he undertook to get off at Temple for some purpose essential to his journey, such as getting his ticket changed. There was another demurrer upon the ground that the petition has no express allegation that defendant "had been negligent either in announcing the station, or in stopping the train over a trestle, nor that the two acts concurring constituted the negligence which caused plaintiff's injuries. The latter ground of demurrer is not well founded. The petition charges that the injuries were occasioned by the negligence of defendant's servants, and sets forth the acts of its servants of which he complains as leading to his injuries. Therefore the petition, by unmistakable intendment, if not expressly, charges those acts as negligence. This disposes of the third assignment of error.

Injury to Passenger while Alighting—Train Stopped on Trestle—Pleading.

As to the other ground of demurrer, we are of opinion that a passenger is not required to remain upon a train, from the starting point to the point of destination, and permitted to alight at an intermediate station only for some purpose connected with his journey. Getting off at intermediate stations, from motives of either business or curiosity, has been held not to

Right of Passenger to Alight at Intermediate Station.

deprive one of his character as a passenger, or of his right to precautions for his safety as such. Parsons *v.* Railroad Co., 113 N. Y. 355, 21 N. E. 145. We conceive the correct rule to be that he remains a passenger on getting off at intermediate stations, so long as his object in doing so is not inconsistent with the character of passenger. In this state it has been held that he loses none of the rights of a passenger in getting off at such a station to deliver a private message to a person on the platform. Railway Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990. The refusal by the supreme court of a writ of error in the latter case, we think, settles against appellant the propositions made in its second, fourth, and ninth assignments of error. It also disposes of the fifth assignment, because it was immaterial what motive plaintiff had in alighting, as we will hereafter explain. If it should be held that the purpose of his getting off should have been more specifically alleged, still the special demurrer was not upon that ground, but upon the ground that it did not appear from the petition that he desired to get off for a purpose connected with the journey, and that it therefore appeared that defendant owed him no duty at that place in respect to egress. This ground of the demurrer was not good. We are of opinion that the defendant presumptively owes a passenger such duty in cases like this, where the injury is received in getting on or off a train at a station, and that the pleading need not, in such case, state the purpose for which the passenger leaves it, in order to state a case. But in the case we have before us—one where the injury is received in the very act of alighting at a regular station, not after he had alighted—the motive of the passenger is wholly immaterial; for the passenger has the undoubted right to alight at such place for the time the train remains there, or to leave the train altogether, if he desires; and while he is in the act of alighting he is clearly a passenger, and entitled to be treated as such.

Same—Pleading.

There is no merit in the ninth assignment. If the evidence is consulted, it appears that plaintiff sought to get off at Temple because he thought he changed cars there. The seventh and eighth assignments criticise the first paragraph of the court's charge, but we consider them not well taken. The sixteenth assignment of error we dispose of by saying that plaintiff stated in his testimony that he owed the sum of $40 for medical attention, qualifying his previous statement that it was about that sum. The judgment is affirmed.

WHITLEY

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, April 5, 1898.*)

Injury to Licensee Assisting Passenger to Board—Negligence.—Evidence tending to show that while plaintiff was assisting his daughter to board defendant's passenger train at its station a sudden and violent jerk of the car compelled him to jump from the platform of the car thereby breaking his leg, tended to show negligence on the part of defendant, and should have been submitted to the jury.

Same.*—Plaintiff's daughter was accompanied by small children, and plaintiff had told defendant's conductor that he intended to assist his daughter to board the train. *Held*, that plaintiff was not a trespasser, and was entitled to protection from defendant.

Motion to Dismiss—Contributory Negligence.—A motion to dismiss at the close of plaintiff's evidence under St. 1897 of North Carolina, c. 109, being in effect a demurrer, on the hearing of such a motion, evidence of contributory negligence should not be considered.

APPEAL by plaintiff from Cabarrus county superior court. *Reversed, and new trial granted.*

W. G. Means, for appellant.
Charles Price and *G. F. Bason*, for appellee.

FURCHES, J. The plaintiff resides in Concord, and his daughter, Mrs. Deaton, resides in Charlotte. On the day the matter complained of took place, the plaintiff accompanied Mrs. Deaton, with her three small children, to the station in Concord, and purchased a ticket for them from that place to Charlotte. When defendant's train arrived at the station the plaintiff, with his daughter and her children, went to the defendant's passenger coach; the plaintiff carrying one of the children, and the valise of the daughter; the daughter

Injury to Licensee—Assisting Passenger to Board—Negligence.

*See note at end of case.

carrying one of the children, and leading the other child. In this manner they approached the steps of the passenger coach of the train going to Charlotte, where they found the defendant's conductor standing. Plaintiff said to him that he wished to help the lady and children on the train, and then he would get off. The conductor made no reply to what the plaintiff said, and plaintiff and his daughter and her children got on the train. Plaintiff procured a seat for his daughter about three seats from the door where they entered the coach. When he did this he at once turned back, for the purpose of getting off the train; and when he got to the door he discovered that the train had commenced to move and when he stepped on the top step the train gave a sudden jerk, which caused him to lose his equilibrium, and he had to jump to keep from falling. In this way he received the injury complained of,—a broken leg. Mrs. Deaton testified that her father, the plaintiff, left as soon as he got a seat for her and the children, and before she sat down; that just after he left her the train gave two jerks, and one was very violent.

The plaintiff was not a passenger on defendant's road, but it was contended for him that he was a licensee, and, under the circumstances, entitled to the consideration, care, and protection of the defendant. And we do not understand this to be denied by the defendant, though it was contended for the defendant that he was not entitled to the same degree of protection as he would have been if he had been a passenger. We do not propose to discuss this question, further than to say that under the circumstances disclosed by the evidence, the plaintiff was not a trespasser, and was entitled to protection from the defendant. It was so held by this court when this case was here before. 119 N. C. 724, 25 S. E. 1018, citing Daniel v. Railroad Co., 117 N. C. 592, 23 S. E. 327, besides a number of cases cited in the brief of the plaintiff.

Same.

Upon this motion to dismiss under the statute of 1897, c. 109, which is substantially a demurrer to the evidence, we are bound to take the evidence in the strongest view it presents for the plaintiff, as a jury might take that view of the evidence. Gibbs v. Lyon, 95 N. C. 146; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Hygienic Plate Ice Mfg. Co. v. Raleigh & A. A. R. Co. (at this term) 29 S. E. 575. Thus considering the evidence, it would seem that the defendant was guilty of negligence. Deans v. Railroad Co., 107 N. C. 686, 12

Motion to Dismiss—Contributory Negligence.

S. E. 77. Indeed, the case was argued for the defendant upon the ground that the plaintiff was guilty of contributory negligence. This argument necessarily presupposes that the defendant was guilty of negligence. The affirmance of the issue of contributory negligence is upon the defendant, and ordinarily cannot be found by the court. White *v.* Railroad Co., 121 N. C. 484, 27 S. E. 1002; Spruill *v.* Insurance Co., 120 N. C. 141, 27 S. E. 39; Hygienic Plate Ice Mfg. Co. *v.* Raleigh & A. A. R. Co., *supra*. The learned counsel who argued the case for the defendant contended that the court, in considering a case like this, upon a motion to dismiss under the statute of 1897, should not consider alone the evidence most favorable for the plaintiff, but should consider all the evidence in the case, and see whether it made out a case or not. This would put upon the court the work of a jury,—to weigh and consider the weight of the evidence, in violation of reason and all authority, as we hardly think the counsel can find a single authority for this position in our reports. In the case of Hygienic Plate Ice Mfg. Co. *v.* Raleigh & A. A. R. Co., *supra*, it is supposed that there may be an exception to the rule announced in White *v.* Railroad Co., *supra*; Spruill *v.* Insurance Co., *supra*, and Bazemore *v.* Mountain, 121 N. C. 59, 28 S. E. 17. That is where all the evidence introduced is by the plaintiff, and fair-minded men could draw but one conclusion from the evidence, then it would become a question of law for the court. But we do not consider this such a case as that. Indeed, so far as we remember, every point in this case is considered in Hygienic Plate Ice Mfg. Co. *v.* Raleigh & A.A. R. Co., *supra*, and the ruling in that case must govern us in this. There was error in taking the case from the jury upon the testimony before the court. This is not deciding that the plaintiff was entitled to recover, but that he was entitled to have the jury pass upon his evidence. New trial.

NOTE.

Persons Assisting Departing Passenger—Duty of Carrier.—Persons going upon a carrier's premises or entering a carrier's vehicle to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger cannot be deemed passengers themselves. Nor are they trespassers, properly speaking; they should be considered rather in the light of licensees to whom the carrier

Note

owes certain duties. Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406; Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 23 Am. & Eng. R. Cas. 463; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, 8 Am. Ry. Rep. 462.

In Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 41 Am. & Eng. R. Cas. 158, it was held that where a passenger is so sick and enfeebled as to make it necessary for assistants to carry him from the station to a seat in the train upon which he has secured passage, the company, having contracted to carry him with knowledge of his condition,is bound to allow him the required assistance, and is under an obligation to stop the train long enough to afford the persons aiding such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers.

But this case is *disapproved* in Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, and it is there held that a person who enters a railway coach, to assist a woman to a seat, cannot recover damages for injury sustained in leaving the train, by reason of the failure of the trainmen to hold the train a reasonable time for him to get off, unless they had notice of his intention to do so.

If the railway employees offer to assist a woman to a seat, her escort has no right to enter the coach for that purpose, and the company owes him no duty except to refrain from wilful or wanton injury. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 52 Am. & Eng. R. Cas. 260.

It is not negligence for a carrier to start his train before a person who has assisted a passenger on board has had time to get off, unless its servants had notice of his intention to get off. Yarnell *v.* Kansas City, etc., R. Co., 113 Mo. 570.

If the infirmities of passengers require the assistance of others to see them safely on the train, servants or friends attending them for that purpose are under an invitation of the company as direct as that given passengers themselves. Hamilton *v.* Texas, etc., R. Co., 64 Tex. 251, 21 Am. & Eng. R. Cas. 336.

And a notice that all persons not having business with the company were positively forbidden to enter any of its cars does not apply to a person who attends a passenger to render needed assistance. Little Rock, etc., R. Co. *v.* Lawton, 55 Ark. 428, 29 Am. St. Rep. 48, 52 Am. & Eng. R. Cas. 260.

But a person not a passenger, who enters a car for the purpose of assisting an aged relative who is a passenger, cannot maintain an action against the carrier for injuries received, unless it appears that he exercised due care and that there was negligence on the part

of the carrier which caused the injury. Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64.

Illustrative Cases.—If, while a father attends his daughter to aid her infant children to enter the train and procure seats as passengers, the train starts, he must either remain until he can make known his wish to get off, or take the risk of alighting whilst the train is in motion. Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 40 Am. & Eng. R. Cas. 690.

A man going to a station to assist a female relative and her infant child is entitled to sufficient time to escort her to a seat in the car and then to leave the train. Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 8 Am. Ry. Rep. 462.

The plaintiff went to a station at night to meet his wife, who was an incoming passenger. He did not observe her descent from the car, and after some little delay, and seeing the passengers and baggage generally out, he entered a sleeping-car to inquire for her, and was referred to the next car, but was thrown down by the sudden start of the car, and was injured. The employees of the train did not know that he was on the car or was expected. There was some conflict of evidence as to how long the train stopped, or whether any signals were given indicating its readiness to start. It was held that the company was not liable for the injury. Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 23 Am. & Eng. R. Cas. 463.

International & G. N. R. Co.

v.

Satterwhite.

(*Court of Civil Appeals of Texas, June 9, 1898.*)

Instructions.—It is not error to refuse to instruct upon a point already properly submitted by the general charge.

Same.—It is not error to refuse to give an irrelevant instruction.

Same.—It was not error to refuse to give an instruction which ignored material questions connected with the point embraced therein.

Evidence—Opinions.—The opinion of a witness as to time, distance, and space was admissible in evidence, being relevant on the issue whether or not plaintiff was allowed sufficient time to board the train and to alight from it, before it was put in motion.

Same.—Defendant having charged plaintiff with contributory

negligence in attempting to alight from a moving train, it was proper to allow plaintiff to explain his reasons for making the attempt.

Same—Injury to Person Assisting Passenger.*—It appeared from the evidence that it was customary for male relatives of female passengers to escort the latter into defendant's cars; and that plaintiff, at 4 o'clock in the morning, was seen by the conductor and brakeman to escort a lady into the car, after leaving another lady, by whom he was accompanied, on the platform. *Held*, that such evidence tended to show that defendant's servants knew that plaintiff boarded the car merely as an escort.

Case at Bar.—It also appeared from the evidence, that plaintiff, after merely escorting the lady into the car, was told, after the car was in motion, by either defendant's conductor or brakeman, that he had better get off; and that he, while attempting to descend the steps for the purpose of alighting, fell and was injured. *Held*, that, the jury having been properly instructed, a verdict for plaintiff should be affirmed.

APPEAL by defendant from Houston county district court. *Affirmed.*

G. H. Gould and *John I. Moore*, for appellant.
Nunn & Nunn, for appellee.

Case Stated.

PLEASANTS, J. The appellee sued the appellant for damages for injuries sustained by him while alighting from appellant's train of cars, in the town of Crockett, on the morning of the 6th of September, 1894. The plaintiff had boarded the train about the hour of 4 a. m. with his sister, Mrs. Fambrough, who took passage on the train at that hour; and the plaintiff assisted her upon the cars, and, before he could conduct her to a seat, he was called to by another sister, who had accompanied him and Mrs. Fambrough to the depot, and who was awaiting his return from the car, that the train was leaving; and he then requested one of the trainmen, who was either the conductor or brakeman, to find a seat for Mrs. Fambrough, and was proceeding to the platform of the car when he was admonished by this same servant of defendant that he had better get off the train; and, in attempting to descend the steps while the train was moving slowly, he fell, and was injured in his left hand, arm, and shoulder. The acts of negligence charged by the plaintiff were (1) that the defendant did not stop the

*See Whitley *v.* Southern Ry. Co. (N. Car.), *ante*, and *note*.

train for a time reasonably sufficient to enable passengers to get on and off; (2) that the train was not stopped as long as was usual at that station; and (3) that the defendant's agents knew that plaintiff boarded the car as Mrs. Fambrough's assistant, with the intention to get off before the departure of the train, and that sufficient time was not allowed plaintiff to do this. Defendant answered by general denial, and charged plaintiff with contributory negligence (1)in not informing the defendant's agents that his intention in boarding the car was only for the purpose of assisting Mrs. Fambrough; (2) in failing to notify the trainmen, after the train started, of his desire to get off, and requesting them to stop the train; (3) in jumping from the train while it was in motion, from the second step of the coach, and at right angles with the coach; and (4) in failing to have himself properly treated for his injuries. Upon trial of the cause, a verdict and a judgment were rendered for plaintiff for $1,000; and, motion for new trial being refused, defendant appealed to this court for the second time. The former appeal was decided by the court of civil appeals for the Fourth supreme district, and the judgment was reversed, and the cause remanded for another trial. The decision is reported in 38 S. W. 401.

Appellant assigns as error the refusal of the court to charge the jury, at request of defendant, as follows: "Gentlemen of the jury, you are charged that if the plaintiff was guilty of negligence in getting off the train while it was in motion, or in his manner of getting off, or in failing to give notice of his intention to get off (if he did not give notice), then he cannot recover, and you will find for defendant." This assignment is not well taken, for the reason that the court, in its general charge, properly and sufficiently submitted to the jury the matters of defense embraced in the requested instruction. Whether or not this instruction is itself a correct presentation of the law need not be determined.

Instructions.

The next error assigned is the refusal of the court to instruct the jury that the defendant company would not be responsible for any statement made by the brakeman to plaintiff in reference to his getting off the train. Such an instruction would have been irrelevant to the issues joined between the parties. The plaintiff was not seeking to recover of defendant on the ground that he was induced to leave the train while in motion, by the words spoken to him by the brakeman. These words were offered in evi-

Same.

dence as tending to show knowledge on part of the trainmen of plaintiff's purpose and intention to alight from the train as soon as he had rendered proper assistance to Mrs. Fambrough. We think there was no error in refusing this instruction.

The fifth assignment is that the court erred in refusing the following requested charge: "If the train had started before the trainmen learned that plaintiff desired to get off (if they did learn that fact), then it was not negligence to start the train before he got off. And if he then got off the train, without requesting that the train be stopped, he assumed the risk of such an act, and cannot recover for any injury received thereby." This charge assumes that the failure of the plaintiff to request the trainmen to stop the train, to enable him to alight therefrom, would deprive him of the right to recover, regardless of the question whether or not, under the circumstances, the act of attempting to alight from the cars while the train was in motion was one consistent with ordinary prudence. This is not correct, we think; and the charge was calculated to divert the minds of the jury from the real issues of the case. But, if we assume that the charge was a correct and proper exposition of the law, yet its refusal, if error, was harmless error, inasmuch as the jury had been expressly instructed in the court's charge that the plaintiff could not recover if the trainmen were ignorant of the plaintiff's intention to leave the train when it was put in motion by them. Same.

The objection to the testimony of Mrs. Fambrough, on the ground that it was only the conclusion or opinion of the witness, is not good. The opinion of a witness as to time, distance, and space is legitimate. Nor is the testimony objectionable on the ground that it was immaterial and irrelevant. It was relevant and material on the issue whether or not the plaintiff was allowed a reasonably sufficient time to board the train, and to alight from it, before it was put in motion. Evidence—Opinions.

The ninth error assigned is the admission in evidence, over the objection of the defendant, of the testimony of the plaintiff to the effect that he thought it was safe for him to get off the train, as the yard was lighted, and the platform on which he purposed to alight was smooth and even. We are of the opinion that it was not error to admit this testimony. The defendant charged the plaintiff with negligence in attempting to step from the train Same.

while it was moving, and it would seem but reasonable and proper to permit the plaintiff to explain the reasons for making the attempt. See Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8. And, besides, the opinions of witnesses, other than experts, are often admissible as evidence when, as was done by this witness, the facts upon which their opinions are based are testified to by the witnesses.

Under appellant's eleventh assignment of error, it objects to that section of the court's charge which instructs the jury that if the evidence shows that facts and circumstances occurred at the time, and were known to the brakeman and conductor, of such nature and character as there and then brought knowledge to these trainmen, or either of them, that plaintiff was getting on board the train to assist his sister, and intended to get off, such evidence would be as effectual to show notice to the defendant's servants as would evidence of verbal notification of such purpose of the plaintiff. The objection to this charge is that it is not authorized by the evidence. Such objection, we think, is not tenable. The evidence is that it was customary for male relatives or friends of female passengers to escort the latter into the cars, for the purpose of rendering them appropriate assistance; that Mrs. Fambrough, an aged sister of plaintiff, was accompanied to the depot by plaintiff and another of his sisters, and, when the train stopped, the three were standing at the proper place on the platform for embarking upon the train; and that, just opposite that place, the conductor and brakeman alighted within a few feet of the three, and in full view of them, and they were observed by the conductor at this time. The plaintiff and Mrs. Fambrough, leaving the other sister on the platform, without delay ascended the steps of the car, attended by the brakeman or conductor. This occurred at about 4 o'clock a. m. When a gentleman is seen on the platform of a railway station accompanied by two ladies at the hour of 4 o'clock in the morning, awaiting the arrival of a train, and, as soon as it arrives, he conducts one of the ladies into the coach, and leaves the other all alone on the platform, the reasonable conclusion from these facts, it seems to us, would be that, as soon as he could discharge his duties to the lady taking passage upon the train, he would return to the lady left unattended on the platform. We are of the opinion that this evidence was ample to warrant the court in giving the instruction complained of.

Same—Injury to Person Assisting Passenger.

The other assignments assail the verdict as not warranted by the evidence, and as contrary to the law and the evidence. It is sufficient, in discussing these objections, to say that the trial court seems to have announced the law to the jury correctly, and in accordance with the decision of the court of appeals rendered upon the former appeal of this case. The jury were expressly instructed that, if the train were put in motion without knowledge of the conductor and brakeman of the intention of the plaintiff to leave the car as soon as he had rendered the customary and proper assistance to the lady he was escorting into the coach, the plaintiff could not recover, and the verdict should be for the defendant; and that, while the evidence is conflicting on several of the issues presented by the pleadings, there is evidence sufficient to sustain a finding that the servants of defendant had notice of the plaintiff's purpose in boarding the cars; and that he was not allowed a reasonable time to accomplish this purpose before the train was put in motion; and that, in attempting to get off the train while it was in motion, plaintiff, under the circumstances, was not guilty of negligence, either in making the attempt or in the manner in which the attempt was made. The judgment is affirmed. Affirmed.

Case at Bar.

WESTERN & A. R. CO.

v.

GOODWIN.

(*Supreme Court of Georgia, July 25, 1898.*)

Passenger Jumping from Moving Train—Liability.*—In an action of tort against a railroad company for damages resulting from personal injuries, when it appears that such injuries were caused by plaintiff jumping from a moving train of the defendant, and at a time when there was no apparent necessity for his leaving it, and when he was not induced so to act by the defendant, but was told by its agent not to do so, there can be no recovery.

Same—Verdict and Evidence—New Trial.—Irrespective of the alleged errors in the charge and rulings of the court, the verdict being contrary to evidence, the court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

*See note at end of case.

Western & A. R. Co. *v.* Goodwin

ERROR by defendant from Cartersville city court. *Reversed.*

Payne & Tye and *J. M. Niel*, for plaintiff in error.
John W. Akin, for defendant in error.

LEWIS, J. Goodwin sued the railroad company for damages, and obtained a verdict for $150. He alleged in his petition substantially as follows: On January 1, 1897, about 4 o'clock in the morning, he boarded defendant's train at Dalton, with a view of going to his home at Kingston. The conductor told him what the fare was, and said the train did not usually stop there, but agreed to put him off at Kingston, and he accordingly paid his fare to that point. There was some discussion about the fare. Plaintiff lacked about 10 cents of having the amount which was finally furnished him by a passenger on board. During this discussion he alleged that the conductor talked very roughly and insultingly to him, charged him with trying to swindle, and was about to stop the train, and put him off in the woods. As the train was approaching Kingston, and a short distance from the town, the conductor passed plaintiff on the train and told him that he was nearing the town, and to look out, and get off quick; and the conductor then went forward out of the coach in which plaintiff was riding. The train, instead of stopping at Kingston, passed the town at full speed, and the rate of speed was so great that, if plaintiff had attempted to get off, it would have killed him. He started to hunt the conductor, but before he was able to find him, the train had run beyond Kingston two or three miles to a place called "Best Sideling," and it there began to slow up, and plaintiff prepared to get off there, as he did not wish to be carried any further away from home. Watching his chance, he stepped off at a time when the train was going at the slowest rate of speed during the slow-up, and the train increased its speed, and went on without stopping. On account of his age and weight and the speed of the train when he got off, and on account of the unevenness of the ground, he was hurled to the ground, and received bodily injuries, described, which impaired his capacity to labor, and caused him pecuniary damages to an extent stated. Negligence was charged against the defendant in not complying with the special contract to land plaintiff safely in the town of Kingston, and to furnish him a safe place and ample time to alight from its car; in leading him to believe that he must prepare to get off quickly, and that the train

would stop at the proper place for him to alight; in carrying him by the place contracted, and in slowing up and inducing him to get off at a place that was dangerous, and in not having a light to show the dangerous condition of the place; in not slowing up sufficiently for him to alight in safety, and in allowing and inducing him to alight in ignorance of the rate of speed at which the car was moving in the dark; in roughly and insultingly talking to him, through its agent, the conductor, and in thus publicly humiliating him by insinuating and making false charges against him and his honesty. Compensatory and punitive damages were claimed in the sum of $1,000. The defendant demurred to the declaration, which was overruled, and after the rendition of the verdict defendant's motion for a new trial was likewise overruled, and it excepted.

1, 2. The defendant's demurrer was based upon the idea that plaintiff predicated his action upon the breach of an alleged contract, and it therefore demurred to that portion of the petition which was founded on an alleged tort upon the part of the conductor. We think the petition sufficient as an action of tort, and that there was no error in overruling the demurrer. Several grounds were taken in the motion for a new trial, but, under the view we take of this case, we deem it necessary only to consider the general ground that the verdict was contrary to the evidence. There appears in the record absolutely no testimony whatever to sustain any action *ex delicto* against the company. There was no proof of any rough treatment or insulting language used by the conductor to the plaintiff at any time during his trip. The plaintiff testified to the special contract as set out in his declaration. He testified to nothing in the demeanor of the conductor towards him to which he could take any rational exception. He did not see the conductor after the train left Kingston. There was no proof that the conductor knew, after leaving Kingston, that the purpose of plaintiff was to get off at the "sideling," some three miles beyond his destination, or that the train was slowing up with the view of allowing him to depart therefrom. As they were approaching the "sideling," plaintiff stated that the porter on the train said, "they are going to stop now." Plaintiff thought this meant that arrangements were being made for him to get off; but he said that when he went out of the door and got upon the steps with the view of getting off, the porter told him not to

Passenger Jumping from Moving Train—Liability.

Note

jump. He further said, when on the stand the second time, that as he was starting to the door the porter told him he could not get off. The conduct of plaintiff in leaving the train while it was in motion was not induced by any act of the defendant, was entirely voluntary on his part, and was unnecessary. The only damage he sustained resulted from injuries received by jumping from the car while in motion, and when he was told not to undertake the risk. Under the repeated rulings of this court there can be no recovery in such a case. Dixon *v.* Railroad Co., 80 Ga. 212, 5 S. E. 496; Watson *v.* Railroad Co., 81 Ga. 476, 7 S. E. 854; Railway Co. *v.* Watts, 82 Ga. 229, 9 S. E. 129; Jarrett *v.* Railroad Co., 83 Ga. 347, 9 S. E. 681; Whelan *v.* Railroad Co., 84 Ga. 506, 10 S. E. 1091; Railroad Co. *v.* Dickerson, 89 Ga. 455, 15 S. E. 534. Judgment reversed. All the justices concurring.

NOTE.

Liability for Injury to Passenger Alighting from Moving Train Contrary to Warning.—It has been held that if a passenger alights from a moving train, contrary to the warning of the carrier through its known regulations or its servants, he is guilty of contributory negligence and cannot recover for an injury received in such attempt. Jewell *v.* Chicago, etc., R. Co., 54 Wis. 610, 41 Am. Rep. 63, 6 Am. & Eng. R. Cas. 379. See also Ohio, etc., R. Co. *v.* Schiebe, 44 Ill. 460.

In Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, it was held that a passenger who has been negligently carried beyond the station where he intended to stop and where he had a right to be let off, may recover compensation for the inconvenience, loss of time, and the labor of traveling back; but where the plaintiff, under such circumstances, jumped off the car when in motion, though warned not to do so, he could not recover for the injury sustained. In this case it appeared that the car was going probably at the full rate of ten miles an hour, and the act of jumping from a car going at this rate was in itself inexcusable rashness; and the fact of the passenger's being warned of the danger by the brakeman tended to diminish the culpability of the defendant's agent while it aggravated the folly of the plaintiff.

In an action by a passenger to recover damages for personal injuries received while alighting from the defendant company's train, there was evidence that the plaintiff delayed leaving the car when

the train stopped, and attempted to alight after it had started, though warned by the brakeman against doing so. It was held to be error in such case to refuse to charge, as requested, that "if the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover." New York, etc., R. Co. *v.* Enches, 127 Pa. St. 316.

MENSING

v.

MICHIGAN CENT. R. CO.

(*Supreme Court of Michigan, July 12, 1898.*)

Inviting Passenger to Alight at Dangerous Place.*—Inviting a passenger, unfamiliar with the ground, to alight at a place where he is injured by stepping from the car on the T rail of a side track covered by snow is actionable negligence.

Evidence.—A slight discrepancy between plaintiff's testimony given at the first trial, and that given at the second trial, as to the place where he alighted, is not sufficient ground for reversal.

ERROR by defendant to Washtenaw county circuit court. *Affirmed.*

Plaintiff was a passenger over defendant's road from Niles to Dowagiac, on the morning of February 19, 1896. A severe snowstorm was in progress, and at Dowagiac there were about 10 inches of snow upon the ground. The brakeman had announced that the next station would be Dowagiac, and as the train stopped he opened the door and announced the station. Plaintiff, with his valise in one hand and his sample case in the other, stepped off the train, and in doing so claims that his right heel struck upon a T rail of a side track covered by the snow; that he slipped, fell, and was injured. In front of the depot was a plank platform 14 feet wide, and extending some little distance west of the depot. From the west end of this platform a cinder walk, level with the platform, extends westward. North of the

Case Stated.

*See notes at end of case.

platform and cinder walk is a park 137 feet long. From the end of the plank platform to the west end of the park is 105 feet. A spur track commences very near the west end of the platform, and extends in a westerly direction on the north side of the track. The claim of plaintiff is that the car in which he was riding did not stop opposite the platform, but opposite the side track, so that in stepping off he would naturally step on the north rail of the side track, which was hidden in the snow. The negligence charged is the invitation to alight in an unsafe place. Plaintiff had verdict and judgment.

John F. Lawrence (*O. E. Butterfield*, of counsel), for appellant.

Lehman Bros. (*H. Wirt Newkirk*, of counsel), for appellee.

GRANT, C. J. (after stating the facts). Defendant urges that no negligence was shown, because the place where plaintiff was invited to alight was safe in the daytime, and was only rendered unsafe by the snow, and that the sudden fall of snow was therefore the approximate cause of the accident. It is sought to apply to this case the rule that municipalities are not liable for damages resulting from natural accumulations of ice and snow. There may be situations where this rule will apply, but it is not applicable to the present case. It was held in Piquegno *v.* Railway Co., 52 Mich. 40, 17 N. W. 232, that a railroad company does not owe the duty to its employees to remove the snow and ice from the ground along its track, even in proximity to depot platforms. In Canfield *v.* Railway Co., 78 Mich. 356, 44 N. W. 385, the company was held liable to a pedestrian falling upon an accumulation of ice caused by the freezing of water dripping from the water spout of its water tank upon the sidewalk. These are the only two cases cited from this court, and we do not recall any others involving accumulations of ice and snow.

Plaintiff was a stranger, was invited to alight, and had the right to presume that the place was reasonably safe. Counsel for the defendant appear to concede that, if a passenger was invited to alight at such place in the night, it would be negligence not to warn him of the danger, and take reasonable means to assist him in alighting. The brakeman was chargeable with knowledge of the location of the track. A little effort on his part with his foot would have removed the snow from the rail, and showed a safe place to alight. The danger was, or should have been, known to defendant. It

was not, and could not have been, known to the plaintiff. Cartwright *v.* Railway Co., 52 Mich. 606, 18 N. W. 380, states the rule governing this case as follows: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance or give warning, or to move the car to a more suitable place." See, also, the authorities cited in that case. The case was properly submitted to the jury.

2. This case was twice tried, the first jury rendering a verdict for the defendant. That verdict was set aside by the trial judge, and a new trial ordered. It is urged that plaintiff changed his testimony in the last trial from what it was in the first as to the place where he alighted. On account of this discrepancy, counsel urge the verdict ought not to stand. It is claimed that on the first trial he located the place where it was impossible for him to have stepped upon the rail, while upon the second trial he located it further west. We do not think there was such discrepancy as to justify us in reversing the case. We think it was a question for the jury, and we see no occasion for disturbing their verdict. Judgment affirmed. The other justices concurred.

NOTES.

Duty to Stop Train Alongside Platform.—It is the duty of the conductor of a railway train to stop the cars alongside the platform at its stations, so that the passengers may have a safe landing. Cockle *v.* London, etc., R. Co., L. R. 5 C. P. 464; Praeger *v.* Bristol, etc., R. Co., 24 L. T. N. S. 105; Whittaker *v.* Manchester, etc., R. Co., L. R. 5 C. P. 464, *note* 3; Eddy *v.* Wallace, 49 Fed. Rep. 801, 52 Am. & Eng. R. Cas. 265; St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198; Columbus, etc., R. Co. *v.* Farrell, 31 Ind. 408; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Adams *v.* Missouri Pac. R. Co., 100 Mo. 555, 41 Am. & Eng. R. Cas. 105; Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578. See also Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823.

And if passengers are required to alight at any other point the company is liable for any injury to them resulting thereby; Rose *v.* North Eastern R. Co., 2 Exch. Div. 248, 46 L. J. Exch. Div. 374, 25 W. R. 205, 35 L. T. N. S. 693, *reversing* 34 L. T. N. S. 761; Robson

Notes

v. North Eastern R. Co., 2 Q. B. Div. 85, 46 L. J. Q. B. Div. 50, 25 W. R. 418, 35 L. T. N. S. 535, *affirming* 32 L. T. N. S. 551, L. R. 10 Q. B. 271, 44 L. J. Q. B. 112, 23 W. R. 791, Gill *v.* Great Eastern R. Co., 26 L. T. N. S. 945; Cartwright *v.* Chicago, etc., R. Co., 52 Mich. 606, 50 Am. Rep. 274, 16 Am. & Eng. R. Cas. 321; Warden *v.* Missouri Pac. R. Co., 35 Mo. App. 631; Flannagan *v.* New York, etc., R. Co., 5 Silv. Sup. Ct. (N. Y.) 495; Texas, etc., R. Co. *v.* Pollard, 2 Tex. App. Civ. Cas., § 481.

See also McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Lambeth *v.* North Carolina R. Co., 66 N. Car. 499, 8 Am. Rep. 508; Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358.

Illustrations.—In Foy *v.* London, etc., R. Co., 18 C. B. N. S. 228, 114 E. C. L. 228, 13 W. R. 293, 11 L. T. N. S. 606, it was held that a company was guilty of negligence in not providing means of alighting where its cars were not drawn up to a platform, and passengers were required to descend three feet to the ground. In this case a woman who, instead of availing herself of two steps, jumped from the first step to the ground with the assistance of a man, and thereby sustained spinal injuries, was held to be entitled to recover.

In St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198, a passenger was aroused from sleep at night and told that his station had been reached. Both the conductor and brakeman urged him to hurry and get off. In doing so, he fell and was injured by reason of the fact that the train had passed the platform, and it was held that the company was liable.

Where a porter called out several times the name of the station and let out some passengers, and a reasonable time for backing the train up to the platform had elapsed, and there was at hand no servant whom a passenger could request to have the train backed, and he, while cautiously alighting, fell and was injured, there was evidence of negligence on the part of the company. Nicholls *v.* Great Southern, etc., Co., 7 Ir. R. C. L. 40, 21 W. R. 387.

PEOPLE *ex rel* CANTRELL

v.

ST. LOUIS A. & T. H. R. CO.

(*Supreme Court of Illinois, Dec. 21, 1898.*)

Equipment and Operation of Railroads—Mandamus.*—When it is sought by *mandamus* to compel a railroad company to do any act in relation to the equipment and operation of its road, the courts, as a general rule, will not interfere with its management of its railway in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted.

Same—Railroad Leases—Obligations of Lessee.—In case of a lease by one railroad company to another, the lessee assumes the obligations contained in the charter of the lessor, and must conform to the requirements of such charter.

Same—Same—Same.—The obligation to equip and operate and to continue in operation a leased public railroad involves the obligation to furnish and use cars and locomotives for the transportation of both passengers and freight.

Carriers of Passengers—Furnishing Only Mixed Trains.—The operation of a railroad with a mixed train only (consisting of freight and passenger cars) is inconsistent with the duty of furnishing such cars and locomotives as are necessary to the suitable and proper operation of the road when engaged in the passenger traffic.

Same—Same—Mandamus.—*Mandamus* will lie to compel a railroad company to run a separate daily train for passengers, each way over its road, its duty to do so being a specific duty.

Same—Same—Same—Amount of Business.—Even if it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, all its business, whether done by its main road, or by other roads leased by it, should be considered in determining whether it should be compelled to run a train for passengers exclusively.

Railroad Liabilities—Preferred Stock.—Guaranteed or preferred railroad stock is but a dividend, and not a debt.

*See notes at end of case.

People *v.* St. Louis, etc., R. Co

Stockholders and the Public.—The interests of the stockholders of a railroad in their profits is secondary, and, in the main, subsidiary to the interest of the public.

Case at Bar.—The amount of appellee's business and profits is not such as to constitute a valid defense to the application for *mandamus.*

APPEAL by relator from Franklin county circuit court. *Reversed.*

This is a petition for a writ of *mandamus* in its amended form, presented in the name of the people of the state of Illinois, at the relation of William S. Cantrell, a citizen and property owner of Benton, Franklin county, Ill., as a patron of the defendant railroad company, the prayer of which petition is as follows: "That a writ of *mandamus* be issued, directed to the St. Louis, Alton & Terre Haute Railroad Company, commanding it to cause to be furnished, placed, run, and operated on said railroad, extending from Eldorado to Duquoin, a daily (Sundays excepted) passenger train, each way, suitable and sufficient to carry all passengers, with their necessary baggage, in comfortable and reasonable security, and at a reasonable speed, and to operate said line of railroad from East St. Louis to Eldorado as a continuous line, and that, upon final hearing hereof, such further order be made in the premises as to the court shall seem meet and proper." The petition was answered by the respondent railroad company. A replication was filed to the answer, except as to one paragraph thereof, which was demurred to, and the demurrer sustained. A jury was waived, and the cause was submitted by agreement for trial before the circuit judge without a jury. The trial judge rendered judgment refusing the prayer of the petition, and dismissing the same, from which judgment the present appeal is prosecuted.

Case Stated.

A large amount of testimony, oral and documentary, was introduced upon the hearing, including reports of the respondent company to the railroad and warehouse commissioners, the charter of the Belleville & Eldorado Railroad Company, as found on pages 485, 486, and 487 of the Private Laws of 1861, and the lease executed by the Belleville & Eldorado Railroad Company to the respondent in 1880. The petition avers that the railroad of the Belleville & Eldorado Railroad Company is the only railroad in Franklin county, and also contains the following averments: "That on or about

December 1, 1893, numerous citizens of said towns of Benton, Eldorado, Christopher, Mulkeytown, Thompsonville, and other towns along said line of railroad, presented petitions to the said railroad and warehouse commission of the state of Illinois, complaining of the train service on said railroad extending from Eldorado to Duquoin, and setting forth the alleged facts relating thereto, and asking the said commission to take cognizance of their complaint, and by appropriate order or orders, or by appropriate suit or suits, compel the said St. Louis, Alton & Terre Haute Railroad Company to run its trains through from St. Louis to Eldorado as one continuous line, and run a daily through passenger train, with appropriate connections with other trains at Duquoin and Eldorado, and give the public such further relief in the way of train service on said railroad as justice and right demand. That thereupon said commission gave notice to said railroad company of the presentation of said petition, and such action was thereupon afterwards taken and had by said commission that on January 9 and 10, 1894, a hearing was had at Benton on said petition, at which time and place said railroad company was present and represented by its president, Hon. George W. Parker, and its counsel, F. M. Youngblood, and the said petitioners were represented by Hons. C. H. Layman and D. R. Webb; and thereupon, after hearing and considering the evidence introduced by the petitioners and the said company, the said commission made and promulgated the following order or recommendation in the premises, to wit: 'We therefore recommend to you, the St. Louis, Alton and Terre Haute Railroad Company, that you, without delay, cause to be placed and operated on the Belleville and Eldorado Division of your road, in addition to the mixed train now being operated by you on said line, a daily passenger train suitable and sufficient to carry all passengers, with their necessary baggage, in comfort and security, and at a reasonable speed, and that you operate your said railroad from East St. Louis to Eldorado as a continuous line, so that persons desiring to leave Eldorado and intermediate points in the morning of each day (Sundays excepted) may be able to go on said railroad to East St. Louis and return the same day.' That said St. Louis, Alton & Terre Haute Railroad Company has wholly neglected to comply with the said order or follow said recommendation, but, on the contrary, refuses to comply therewith, and yet continues to run its said train as before, and still fails to

accommodate the traveling public." Such other facts, set up in the pleadings and developed by the proofs, as are necessary to an understanding of the questions involved, are sufficiently stated in the opinion.

Maurice T. Moloney, Atty. Gen., H. J. Hamlin, A. W. O'Hara, T. J. Scofield, and *M. L. Newell*, for appellant.

F. M. Youngblood, and *John H. Mulkey*, for appellee.

MAGRUDER, J. (after stating the facts). The main question in this case is whether a railroad company can be compelled by *mandamus* to run a passenger train. The appellee operates about 50 miles of railroad running from Duquoin easterly to Eldorado, which it leased in 1880 for 985 years, from the Belleville & Eldorado Railroad Company; and it is conceded that it runs no passenger train—that is, no train for passenger service exclusively—over this distance of 50 miles between Duquoin and Eldorado. On Sunday and Monday evenings, a train, consisting of a baggage car and one passenger coach, runs from Duquoin easterly to Benton about 18 miles, returning from Benton to Duquoin the next morning about 4 o'clock; but the only train which runs the whole length of the branch road between Duquoin and Eldorado is what is called a "mixed train," consisting of coal, stock, and freight cars, to which are attached a combination car and passenger coach. This mixed train leaves Duquoin daily at 11 o'clock a. m. for Eldorado, and returning in the afternoon, arrives at Duquoin at 7:10 p. m. Appellee runs through trains from St. Louis, by way of Belleville, to Duquoin; but the mixed train in question does not connect at Duquoin with any of the passenger trains run by appellee from Duquoin to St. Louis, nor at Eldorado with any of the trains upon the Cairo Division of the Cleveland, Cincinnati, Chicago & St. Louis Railroad, or the Shawneetown Branch of the Louisville & Nashville Railroad. Passengers for St. Louis or points west of Duquoin must remain over night at Duquoin, and take the train next morning, at 4:50 o'clock. This mixed train carries freight, express, baggage, stock, mail, and passengers. On account of the freight carried and handled, it is a slow train, being often behind its schedule time from 20 minutes to 3 hours. During the busy shipping season, it often has to be cut in two on the grades, one part going forward to a switch, and returning for the balance of the train, including the passenger coach. At Eldorado the entire train is often pushed in front of the engine down to

the depot. When the mixed train goes east, the passenger coach, which is used by all classes of passengers, both ladies and gentlemen, is between the freight cars and the combination coach. The mixed train has two brakemen, is operated by hand brakes, and has no air brakes. The regular passenger trains on the other parts of the road are equipped with air brakes operated from the engine. The roadbed is a dirt ballast, and the passenger car on the mixed train is dirtier and dustier than the passenger cars on the west end of the road. There is often an odor from the stock cars ahead of the passenger coach. It is bad for ladies and children. The stock cars are frequently filthy and offensive from the manure in them. The train is often delayed at the stations to take on and deliver freight. It is subject to jars that stagger the passengers. Much switching is done, and, where switching is done at a station, the passenger coach is usually uncoupled; and passengers must wait while the cars are loaded with stock, cattle, and hogs, and are often inconvenienced by the gang planks thrown out. The country through which the mixed train passes is a farming country, and well settled. The products shipped are mostly grain, mill products, and live stock; and the freight distributed along the line is merchandise. St. Louis seems to be the commercial center for that part of the state. Of the counties through which the mixed train runs, Franklin county has a population of 17,138; Perry county, 17,259, Saline county, 19,342. And, of the towns along the line of the road, Duquoin has a population of about 5,000; Benton, 1,200; Eldorado, 2,000; Galatia, 800; Thompsonville, 500; Raleigh, 500; Christopher, 200; Mulkeytown, 200. Improved lands in that section are worth from $20 to $50 per acre. Such being the character of the mixed train, and such being the character and population of the territory through which the mixed train runs, ought appellee to be required to furnish the people with a passenger train? The question is not whether appellee should run more than one train, but the question is whether it does all that it is required to do when it runs a passenger coach attached to a freight train, or whether it is its duty to run one or more passenger coaches, separate and disconnected from freight cars, for the accommodation of passengers only, and not of passengers in connection with shippers.

When it is sought by *mandamus* to compel a railroad company to do any act in relation to the equipment and

operation of its road, the courts, as a general rule, will not interfere with its management of its railway in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. People *v.* Chicago & A. R. Co., 130 Ill. 175, 22 N. E. 857, 40 Am. & Eng. R. Cas. 352. Whether or not the people are here entitled to relief by *mandamus* against the appellee company must be determined by the answer to the inquiry whether the act sought to be enforced is specific, and whether the right to a performance of that act is clear and undoubted. There can be no doubt about the clear legal duty of the appellee to operate the railroad from Duquoin to Eldorado, leased by it from the Belleville & Eldorado Railroad Company. The act of February 12, 1855, to enable railroad companies to enter into operative contracts, and to money, authorizes railroad companies organized under the laws of Illinois to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof. 2 Starr & C. Ann. St. p. 1921. In case of a lease by one railroad company to another, the lessee assumes the rights, franchises, and obligations contained in the charter of the lessor, and must conform to the requirements of said charter. 1 Rorer, R. R. p. 610; 19 Am. & Eng. Enc. Law, p. 897. "And when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor." City of Chicago *v.* Evans, 24 Ill. 52. When, therefore, the appellee leased the road in question from the Belleville & Eldorado Railroad Company, it assumed the charter obligations of the latter company, and agreed to conform to its charter requirements. Section 1 of the act to incorporate the Belleville & Eldorado Railroad Company, in force February 22, 1861, declares that the company "shall possess all the powers * * * necessary to carry into effect the objects and purposes of this act, which are to lay out, build, construct, equip, complete and continue in operation a railroad from Belleville in St. Clair county by way of Benton in Franklin county, and Galatia and Raleigh and to Eldorado in Saline County; * * * and they may make connections with any railroad on the line, or at either terminus, on such terms as may be mutually agreed upon between the parties." Priv. Laws Ill. 1861, p. 485. Section 4 of the act provides that "said company

Equipment and Operation of Railroads—Mandamus.

Same—Railroad Leases—Obligations of Lessee.

shall have power, when, in their discretion, they have a sufficient amount of capital stock subscribed, to proceed to lay out, locate, construct, build, equip, complete and operate their road." *Id.* p. 486. It will be noticed that the charter of the Belleville & Eldorado Railroad Company provided for the construction, equipment, and operation of a railroad "from Belleville in St. Clair county by way of Benton in Franklin county, and Galatia and Raleigh and to Eldorado in Saline county." As matter of fact, however, the Belleville & Eldorado Railroad Company never constructed a railroad from Belleville to Eldorado. It constructed a road about 50 miles long from Eldorado to Duquoin, in Perry county, the latter place being distant more than 56 miles from Belleville; and as soon as the road between Duquoin and Eldorado was finished, and on July 1, 1880, it leased the latter road to appellee. At that time appellee owned and operated a railroad running from East St. Louis, opposite St. Louis, to Belleville, a distance of a little more than 14 miles, and, prior to that time, had leased for a long term of years the railroad of the Belleville & Southern Illinois railroad Company, running from Belleville to Duquoin, and was then operating the entire line from East St. Louis to Duquoin as one road, commonly known as the "Cairo Short Line." The lease made on July 1, 1880, by the Belleville & Eldorado Railroad Company to appellee, recites the ownership by appellee of the road from East St. Louis to Belleville, and its lease of the road from Belleville to Duquoin, and its operation of the two as one line, and also recites the completion of the road from Duquoin to Eldorado, "and that it is deemed and considered for the mutual interest of the parties hereto [the Belleville & Eldorado Railroad Company and appellee] that said roads [the three roads] should be placed under the same management, and operated as one line; and, to that end, the party of the second part [appellee] has agreed to lease from the party of the first part [the Belleville & Eldorado Railroad Company] its railroad from Duquoin to Eldorado," etc. It thus appears from the recitals of the lease of July 1, 1880, that the object of that lease was to so connect the road from Duquoin to Eldorado with the roads from East St. Louis to Belleville, and from Belleville to Duquoin, as that the three roads could be operated as one line. And so, although the Belleville & Eldorado Railroad Company did not construct a road from Belleville to Eldorado, as its charter provided, yet, by the connection thus made with the road leased by appellee

which ran from Belleville to Duquoin, it became part of a continuous road from Belleville to Eldorado, the terminal points named in its charter.

As the Belleville & Eldorado Railroad Company was bound to equip and operate its road, the appellee, the lessee company, was also bound to equip and operate the leased road. "Equipment," as applied to railroads, has been defined to be "the necessary adjuncts of a railway, as cars, locomotives." Rubey *v.* Mining Co., 21 Mo. App. 159; 6 Am. & Eng. Enc. Law, p. 655, *note* 6. Section 12 of article 11 of the constitution says: "Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." 1 Starr & C. Ann. St. p. 163. It follows that the obligation to equip and operate and continue in operation the leased road involves the obligation to furnish and use cars and locomotives for the transportation of persons and property; that is to say, for the carriage of both passengers and freight. Section 22 of the act of this state in relation to fencing and operating railroads provides (2 Starr & C. Ann. St. p. 1940) that "every railroad corporation in the state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights." It is claimed, however, in behalf of appellee, that, while it is obliged to furnish cars for the carriage of passengers, yet it is not necessarily obliged to carry passengers upon a separate passenger train, and that it has the right to exercise its own discretion as to the manner of their transportation. The discretionary power of railroad companies in this respect is subject always to the condition that there is no statutory provision limiting and restricting such power, and that its exercise is not opposed to the terms of the charter. People *v.* Chicago & A. R. Co., *supra*; Mobile & O. R. Co. *v.* People, 132 Ill. 559, 42 Am. & Eng. R. Cas. 671, 24 N. E. 643; 2 Mor. Priv. Corp. (2d Ed.) § 1119. This discretion is also subject to the condition that it must be exercised in good faith and with a due regard to the necessities and convenience of the public. People *v.* Chicago & A. R. Co., *supra*.

Same—Same—Same.

Counsel for appellant rely upon articles 1 and 6 of the lease of July 1, 1880. Article 1 is as follows: "The party of the second part shall have, possess, and operate the said railroad from Duquoin to Eldorado, for and during the time hereinbefore mentioned, upon the terms and conditions herein set forth, at all times during the continuance of this lease, furnish all necessary rolling stock and equipment for the complete and perfect operation of the said demised railroad." And in the sixth article the defendant company covenants as follows: "The said party of the second part shall and will, during the term hereby granted, operate, maintain and keep in good repair the railroad and premises hereby demised, and shall, from time to time, make all necessary additions and improvements, and shall and will indemnify and save harmless the said party of the first part, its successors and assigns, from and against all costs, charges, and expenses, damages, and liabilities whatsoever, growing out of the maintaining, repairing, operating, or using of said road." Thus, by the terms of the agreement made for the connection of the road of the Belleville & Eldorado Railroad Company with the roads of appellee, appellee was to operate the three roads from East St. Louis to Eldorado as one road, and to "furnish all necessary rolling stock and equipment for the complete and perfect operation" of the road from Duquoin to Eldorado. But, independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight,—a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of

furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train which shall be run for the purpose of transporting passengers only, and not freight and passengers together.

Railroad corporations, engaged in the transportation of passengers for hire or reward, are bound to the exercise of the highest degree of care and diligence in the conduct of their business. "Their duties and liabilities in this respect extend as well to the appliances used as to the manner of using them." 2 Rorer, R. R. pp. 948-949. But there are necessary differences between passenger and freight trains. 2 Wood, R. R. p. 1288. These differences need not be here noticed, but are well understood and easily recognized. Railroad companies are not required to adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but they are merely required to use the highest degree of care consistent with the practical operation of such trains. Oviatt *v.* Railroad Co., 43 Minn. 300, 44 Am. & Eng. R. Cas. 311, 45 N. W. 436. When passengers are carried on freight or mixed trains, the care required of the company, so far as such appliances are concerned, is such as the nature of the train permits. 2. Wood, R. R. p. 1288. And, when a passenger rides on a freight or mixed train, he takes upon himself the increased risk and lessened comfort which is incident thereto; nor has he the legal right to demand any other care in the management of such a train than is requisite for that kind of a train, or any other security than such a mode of conveyance affords. 2 Rorer, R. R. p. 947; Railroad Co. *v.* Fay, 16 Ill. 558; Railroad Co. *v.* Hazzard, 26 Ill. 373.

Carriers of Passengers—Furnishing Only Mixed Trains.

It follows that, when the only train operated by a railroad company is a mixed train, passengers, being unable to ride upon any other kind of train, are forced to incur risks and submit to inconveniences which do not exist on a separate passenger train. Hence the operation of a railroad with a mixed train only is inconsistent with the duty of furnishing such cars and locomotives as are necessary to the suitable and proper operation of the railroad when engaged in the passenger traffic. We are not unmindful of the fact that, within certain limits, a discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and proper operation of a railroad carrying passengers. When the mode of carrying passengers is separate from the mode of carrying

freight, the legitimate exercise of discretion may begin. What we hold is that there cannot be suitable and proper operation of the railroad as a carrier of passengers when the car in which it carries its passengers is part of a freight train, because freight trains are inferior to passenger trains, and travel in them is attended with less comfort, convenience, and safety than travel in passenger trains. The inferiority of a freight train to a passenger train as a mode of carrying passengers is so obvious that no man of ordinary understanding would regard the use of a freight train for the purpose of hauling a passenger car as suitable and proper operation of a railroad in the matter of transporting passengers. We are therefore of the opinion that the act here sought to be enforced—the running of a passenger car or cars separately from freight cars—is sufficiently specific to be enforced by *mandamus*, and the right to compel its performance is clear and undoubted, unless such right is changed or modified by the decision of the question whether the expense of running such a passenger car or train would be justified by the amount of business over the particular line of road running from Duquoin to Eldorado.

Counsel for appellee insists that a railroad company is not bound to provide a separate passenger train when its business is not sufficient to warrant it in doing so. In Ohio & M. Ry. Co. *v.* People, 120 Ill. 200, 30 Am. & Eng. R. Cas. 509, 11 N. E. 347, where the lower court awarded a *mandamus* upon a petition to compel a railroad company to repair and improve generally a certain portion of its road, and to increase the passenger trains thereon, we reversed the judgment, and held that the writ was improperly issued, upon the grounds that the business of the road did not pay the current expenses, that the defendant was unable to perform the acts sought to be enforced, and that the requirement made upon the defendant was too general, and involved two much discretion as to details; but it was there said that a railroad company could be compelled by *mandamus* to perform any specific duty which it owed to the public as owner or operator of its road, such as operating its road as a continuous line, and running daily trains; and the following language was used (page 206, 120 Ill., and page 350, 11 N. E.): "It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by *mandamus* to increase the number of trains on its road, or to run daily a

particular number of trains over its road; and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by *mandamus* to perform this, like any other specific duty enjoined by its charter, or by other statutory provision. * * * A company that runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, certainly does as much as the law requires of it, so far as passenger trains are concerned."

Same—Same—Mandamus.

There are several marked differences between the Ohio & M. Ry. Co. Case and the case at bar. Here the appellee does not run a daily passenger train each way over the road from Duquoin to Eldorado. Here the charter enjoins a duty which cannot be regarded as otherwise than specific in view of the considerations already presented. Here it cannot be said that the appellee is financially unable to discharge the duty imposed upon it by the law, and which it owes to the public. The learned circuit judge before whom this case was tried below says, in his decision of it, that "defendant railroad company is solvent and in a prosperous condition, its net earnings last year being over $600,000, a net income of about $3,000 per mile of road." After a careful examination, we are satisfied that the statement thus made is sustained by the evidence. When, however, it is said that "the defendant railroad company" has a net yearly income of some $600,000, the reference is to the defendant railroad company as made up of its branches or leased roads, as well as of the main stem. So far as appears from this record, the main road, owned by appellee, and operated under its own charter, is the short line running from St. Louis to Belleville; but, besides the leased roads running from Belleville to Duquoin and from Duquoin to Eldorado, appellee also operated three other roads leased by it for long terms of years, to wit: The Belleville & Carondelet Railroad, a short road, about 17 miles long, running west from Belleville, to East Carondelet, on the Mississippi river; the St. Louis Southern Railroad, 46 miles long, which taps said leased road that runs from Belleville to Duquoin, at Pinckneyville about 10 miles east or northeast from Duquoin, and runs from Pinckneyville to Marion; and the Chicago, St. Louis & Paducah Railroad, about 52 miles long, running from Marion

to Brooklyn, on the Ohio river. The Belleville & Carondelet road was not leased by appellee until June 1, 1893, and therefore but little consideration can be given to it, in making up the estimate of earnings and expenses as found in the record. The large net income referred to is based mainly upon the earnings of the other five roads already mentioned.

It is said that the earnings of the Belleville & Eldorado Railroad, running from Duquoin to Eldorado, when that road is taken by itself and considered separately, are not sufficient to justify the expense of running a separate passenger train from Duquoin to Eldorado. But why should this branch be considered separately and by itself? Appellee operates its main road and its leased branches as one system, and, as thus operated, the main road and its connections or branches yield the net yearly income of about $600,000 already referred to. All the divisions, which are entirely within the boundaries of the state of Illinois, are mere feeders of the main road running from East St. Louis to Belleville, which is also in Illinois; and all the leased roads above mentioned, except that running to East Carondelet, are feeders of the road running from Belleville to Duquoin. The latter road and the Belleville & Eldorado Railroad are required, by the charter of the Belleville & Eldorado Railroad Company, and by the terms of its lease to or agreement with appellee, to be operated as one line; and such operation as one continuous line is merely the carrying out of the original intention of said charter, which provided for the operation of one continuous line from Belleville to Eldorado. It is no more proper to select the 50 miles from Duquoin to Eldorado of this compact network of roads, all operated under one system, and all contributing to the support of each other, as being deficient in the profits necessary to justify a reasonably safe and convenient operation of passenger traffic, than it would be to select any other portion of the line running from East St. Louis to Duquoin, and charge that portion with being deficient in such profits.

If it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, we are confronted at this point with the question whether this doctrine refers to the business done by the main road and other roads leased by it and connected with it, all of which are operated, or are required to be operated, as one line, or whether it can be made to refer to a small part of the continuous line or system which happens to run

Same—Same—Same—Amount of Business.

through a section of country, where the freight is not so much, and the passengers are not so many, as is the case on some other part of the line. We are of the opinion that the whole business of the various parts operated as one line should be taken into consideration where the circumstances are such as are revealed by this record.

The duty required of a railroad company in the matter of transporting passengers is the duty to meet and supply the public wants. These wants are measured by the business actually done, or what, it could be clearly shown, could be done if increased facilities were granted. That there is here a public demand for passenger service is shown by the fact that a passenger car is attached to a freight train, and that passengers are invited to ride, and do ride, upon this mixed train. It is not contended that appellee is not abundantly able, out of the earnings realized by it from the system controlled by it, to pay the expense of running a passenger car separately from freight cars over the Belleville & Eldorado Railroad, and thereby save the traveling public from the increased danger and inconvenience of taking passage on a freight train. Nor does it appear that such expense could not be easily met by the earnings of the line running from East St. Louis to Eldorado, by way of Duquoin. The following language used by the supreme court of the United States, in St. John *v.* Railway Co., 22 Wall. 136, is applicable here: "The business of the road was a unit. If it had been disintegrated, as proposed by complainant, we apprehend it would have been found that the co-relations of the main stem and the branches were such, and that the expenses and charges incident to the entire business and to those of the several parts were so interwoven and blended, that an accurate ascertainment of the next profits of the main line, and any of the auxiliaries taken separately from the rest, would have been impracticable. An ancillary road may be short and yield but little income; yet by reason of its reaching to coal fields or from other local causes, its contributions to other roads of the series may be very large and profitable. Whether, in this case, the partial computation insisted upon could or could not have been made, the process was one upon which the company was neither bound nor had the right to enter." The reports made by appellee to the railroad and warehouse commissioners for the years 1891, 1892, and 1893 show that it has never kept a separate account of the actual earnings or expenditures of the road from Duquoin to Eldorado, but has treated the line from

East St. Louis to Eldorado as one continuous line, making no difference in its accounts between the division from Duquoin to Eldorado and any other portion of the road.

In estimating the liabilities of the Belleville & Eldorado Railroad Company, certain indebtedness, which is in the nature of preferred stock, is charged up as a liability, in the accounts produced, to show that the obligations of appellee are such as to relieve it from the duty of operating the passenger train asked for. This is manifestly improper, because guarantied or preferred stock is but a dividend, and not a debt, and the holder of a certificate for such stock can have no action against the company as for a debt, but his right is to a dividend. Taft *v.* Railway Co., 8 R. I. 310; St. John *v.* Railway Co., *supra*; 1 Rorer, R. R. p. 167.

Railroad Liabilities—Preferred Stock.

The object of incorporating railroad companies is to secure to the public increased facilities of transit from point to point, and an improved mode of carrying persons and property. Their public character is apparent from the fact that they are clothed with the power of taking private property through the exercise of the right of eminent domain. Prior to the adoption of the present constitution, municipal corporations were authorized to aid in the construction of railroads by subscribing for their stock. As matter of fact, Franklin county, through which the Belleville & Eldorado Railroad passes, subscribed $150,000 to its construction, of which indebtedness $37,000 is still outstanding. Railroads are creatures of the law, and are intrusted with the exercise of these sovereign powers to promote the public interest, and are therefore bound to conduct their affairs in furtherance of the public objects of their creation. The interest of stockholders in their profits is secondary, and, in the main, subsidiary to the interest of the public. It is in view of their public character that the courts are authorized to determine and enforce the public duties enjoined upon them. The duties which they owe to the state and the general public cannot be shirked or evaded. 1 Wood, R. R. p. 12; Railroad Com'rs *v.* Portland & O. C. R. Co., 63 Me. 269. We do not think that there is here such insufficiency of business or profits as to present a valid defense to the application of the people. The writ of *mandamus* should issue as prayed for. The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to

Stockholder and the Public.

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enter a judgment awarding the writ in accordance with the prayer of the petition. Reversed and remanded.

PER CURIAM. Since the rehearing was granted in this case, we have given further consideration to the questions involved, and entertain the same views as those expressed in the foregoing opinion, and adhere to the same conclusion there announced. Said opinion is accordingly readopted, and it is ordered that the same be refiled, and that the judgment heretofore entered, reversing the judgment of the circuit court, and remanding the cause to that court with directions to enter a judgment awarding the writ in accordance with the prayer of the petition, be re-entered as the judgment of this court.

NOTES.

Mandamus—Railroad Compelled to Run Trains.—The Hartford and New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with steamboat for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide water, and running to the station of the New York and New Haven Railroad Company, in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide water. This change incommoded travelers who wished to pass by the steamboat route, of whom there were many. *Held*, that a *mandamus* ought to be issued to compel the railroad company to run passenger trains to the original terminus. The railroad company had discontinued the running of passenger trains over that part of the road under a contract with the New York and New Haven Railroad Company, by which the latter was to prevent the extension of a certain railroad chartered by the legislature which would interfere with the Hartford and New Haven road, and the New York and New Haven road was to secure an advantage over the line of steamboats in competing for public travel. *Held*, that this contract was void, as against public policy. *Held*, also, that the *mandamus* was properly applied for by the attorney for the state. State *v.* Hartford, etc., 29 Conn. 538.

By the Act 36 Vic., c. 37, s. 13, the New Brunswick and Canada Ry. Co. is required "to provide and run all trains necessary for the car-

rying of passengers and freight," and to "run at least one daily train each way over the said main line and branches (Sundays excepted), unless prevented by weather, accident, or some other *unavoidable cause*, other than from want of railway stock, or from keeping the road and its appliances in good running order." *Held*, that the fact that there was no profit derived from running a daily train between St. Andrews and Watt Junction (one of the branches of the road) was not one of the "unavoidable causes" that would justify the company in not running a daily train. Railway acts, and those of that description, which are obtained on the application of their promoters, are treated as contracts between the incorporators and the public. The language of the acts is, therefore, considered as the language of the promoters, and where doubts arise as to the construction of that language, the benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers given by the act. Where the remedy by action is not so efficacious as that by *mandamus*, the right to the latter is not taken away. *Ex parte* The Attorney General of New Brunswick, 17 New. Bruns. 667.

Same—Mixed Trains.—In Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, it was held that it was not the duty of a railway company to run separate passenger trains where its business is not sufficient to warrant it in so doing. But, if the business of the company is sufficiently large and profitable to warrant the running of separate passenger trains, and the safety of passengers is endangered by having the passenger coaches mixed up in the same train with freight cars, then it is the duty of the company to run separate trains. Where the business of the company is not such as to require it to run separate passenger trains, the Ark. Stat. (Mansf. Dig. § 5477), requires the company in forming mixed trains, to place baggage and freight cars in front of the passenger coaches; and if the use of bell pulls and air brakes on trains thus formed is impracticable, the law will not require it. But if the use of such appliances on mixed trains is practicable and necessary for the safety of passengers, then the law will demand it. The court said: "Was appellant required to run separate passenger trains on its road? All carriers are not required to adopt like expensive provisions for the safety of passengers. The business of a road might render it unsafe to use a single track and necessary to the safety of passengers to use a double one. It would, unquestionably, be safer for all railroads to have two tracks, and run all trains going in the same direction over the same track. But this does not make it the duty of all railroads to have double tracks. The provisions required to be adopted by passenger carriers for the safety of their passengers vary as the exigencies of the traffic and its remunerative character

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demand and justify. A railway constructed through a thinly settled country, moving but little freight and few passengers, and running its trains at a slow rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory, and moving a large volume of traffic. So the line of a railroad may be so short, and the business done by it so small as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business was sufficiently large and profitable to warrant it, and the safety of the passengers was endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it would clearly be the duty of the railway company to run separate trains. If it was not the duty of appellant to run separate passenger trains, then, under the statutes of this state, it was its duty, in forming its trains, to place the baggage and freight cars in front of the passenger coaches. Mansf. Dig. § 5477. Under such circumstances, the law would not require bell pulls and air brakes to be used on such trains, if it was impracticable to do so. But, on the other hand, if the rule as to care and diligence already laid down required them to be used, it was the duty of appellant to have done so." Missouri Pac. R. Co. *v.* Holcomb, 44 Kan. 332, 44 Am. & Eng. R. Cas. 311, 312.

Same—Railroad not Compelled.—In Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 30 Am. & Eng. R. Cas. 509, it was *held* that there was no authority at common law for granting a writ of *mandamus* to compel a railroad company to increase a number of trains or to run a particular number of trains over its road daily. This case was commented upon and distinguished in the principal case.

Company becoming owner of two lines of road between two termini abandoned one line, but accommodated people by operating other. *Held*, that it could not be compelled by *mandamus* to operate both lines. People *v.* Rome, etc., R. Co., 103 N. Y. 95, 28 Am. & Eng. R. Cas. 35.

A peremptory *mandamus* was awarded in this case commanding the defendant, a railroad company, to run upon its road from its station in Locust Avenue, Queens County, and its station at Long Island city, in the morning and evening, such passenger trains as would, taking into consideration the usual business hours of the day in New York, afford reasonable and necessary railroad facilities to the residents and travelers at Locust station. The company ran one freight train, with a passenger car attached, from Long Island city, stopping at Locust station, in the morning, and ran it back to

the city in the evening. There were but nine houses at Locust station, and but five persons holding commutation tickets. The receipts at that station fell from $274.69, in 1877, to $198.23, in 1881. The extra expense of maintaining the road-bed for full passenger travel would be about $1,500 a year. Prior to the present arrangement the company ran six or seven trains each way daily, and the average number of passengers from this station each way was less than one a day. Jamaica station, at which all trains stopped, was less than two miles from Locust station. *Held*, that the court erred in awarding the *mandamus*. *Quaere*, as to the power of the court to control a railroad company in exercising the power of regulating the time and manner in which passengers and property shall be transferred, conferred upon it by section 9 of subdivision 2 of chapter 133 of 1880, so long as it does not suspend or cease to perform its duties as a common carrier. People *v.* Long Island R. Co., 31 Hun (N. Y.) 125.

Same—Illinois, Arkansas and Minnesota Acts.—An Illinois statute required all trains to stop at county seats. Upon the construction of this statute see Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 61 Am. & Eng. R. Cas. 539, in which case the Illinois decisions are considered. Similar statutes have been held valid in Arkansas and Minnesota, and *mandamus* held to lie to enforce them. State *v.* Gladson, 57 Minn 385, 61 Am. & Eng. R. Cas. 556; St. Louis, etc., R. Co. *v.* B'Shears, 59 Ark. 237, 61 Am. & Eng R. Cas. 556. The Arkansas statute required trains to stop within the corporate limits, upon the application of not less than fifty citizens.

Barry

v.

Boston & A. R. Co.

(*Supreme Judicial Court of Massachusetts, Oct. 20, 1898.*)

Instructions.—A court is not bound to rule upon the effect of certain facts specified in a request considered as detached from other material facts.

Carriers of Passengers—Invitation to Alight—Instructions.*—A requested instruction to the effect that the calling of the station by the brakeman was not in itself an invitation to plaintiff to alight

*See notes at end of case.

was covered by the instruction that: "She was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped. * * * "

Same—Instructions.—It was proper to refuse to instruct that there could be no recovery unless the train actually stopped at a place designed for passengers, the declaration not requiring such fact to be proved.

Conflict in Evidence—Direction of Verdict.—It was not error to refuse to instruct that "the evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight," the evidence as to such fact being conflicting.

EXCEPTIONS by defendant from Worcester county superior court. *Exceptions overruled.*

The defendant requested the following instructions: "(1) If the plaintiff undertook to step off the train when it was in motion, and was injured in consequence, she cannot recover. (2) If the train had not come to a stop when she attempted to step off, she cannot recover, whether she knew it was in motion or not. (3) The plaintiff cannot recover unless the train, at the time she attempted to step off, had come to a stop at the place designed for passengers to alight, unless there is evidence to satisfy the jury that the defendant negligently led the plaintiff to suppose the train had reached and stopped at such a place. (4) The act of the brakeman in calling the station and the actual stopping of the train, are not evidence to warrant a finding that the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight. (5) She was bound to use due care to ascertain whether the train had reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman announced the station, and the train had stopped. (6) The action of the brakeman in calling the station was not an invitation to alight from the train at all, or, if it was, it was not an invitation to alight from the train until it had come to a stop at the station where it was designed to discharge the passengers. (7) On the pleadings and evidence in this case there can be no recovery unless the train had come to a stop at the place designed for passengers to alight, and while the plaintiff was, in the exercise of due care, in the act of alighting, the train was negligently started.

(8) The evidence is not sufficient to warrant a finding that the train had, at the time the plaintiff attempted to step off, come to a stop at the place designed for passengers to alight."

J. R. Thayer and *A. P. Rugg*, for plaintiff.
F. P. Goulding and *W. C. Mellish*, for defendant.

HAMMOND, J. At the close of the evidence the defendant requested the court to give certain rulings, eight in number. The court gave the first three and fifth. The fourth was rightly refused in the form presented. There were other circumstances bearing upon the question whether the plaintiff supposed the train had reached the place for her to alight, and the court was not bound to rule upon the effect of the two facts named in the request considered as detached from all the others. The instruction that "the act of the brakeman in calling the station, and the actual stopping of the train, are to be considered by you in connection with the care which it was necessary for her, the plaintiff, to use in the exercise of her senses, to determine whether the defendant negligently led the plaintiff to suppose the train had reached the place for her to alight," sufficiently covered the subject-matter of the request. The subject-matter of the sixth was fairly covered by the instruction that: "She was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it, simply because the brakeman had announced the station, and the train had stopped. I think I substantially covered that before. She must use her senses. Simply because somebody said 'South Framingham' is not enough. She must use her senses about it." The seventh was rightly refused. The declaration did not require the plaintiff to prove that the train actually had come to a stop at a place designed for passengers. It alleges that "at or near the station at South Framingham the defendant's employee called out in the car in which the plaintiff was seated 'South Framingham' and thereupon the said car stopped, and came to a standstill, and that thereafter the plaintiff, relying upon the said announcement, and believing therefrom and from the stopping of said car that the passenger station had been reached, attempted to alight from said car; that as she was on the point of stepping from said car, the train suddenly started, and she was thrown with great force to the ground." It nowhere states where the train

Instructions.

Carriers of Passengers—Invitation to Alight—Instructions.

Same—Instructions.

stopped, and proof of a stopping elsewhere then at the place designed for passengers to alight was no variance. And the rest of the request was given subject to the modification contained in the latter part of the third instruction which was given. This was all the plaintiff was entitled to. The refusal to give the eighth presents a question of more difficulty. The evidence produced by the defendant seems to have a very strong tendency to show that at the time the plaintiff attempted to get off the train had not come to a stop at the place designed for passengers to alight. On the other hand, the plaintiff testified that when she was stepping out she saw the platform of the depot, and tried to step upon it, and that she "was stepping on the fourth step, and just stepping on the platform." It is argued for the plaintiff that in other parts of her testimony it appears that she did not know what she was going to step on when she left the car, and that in saying she saw the platform she was mistaken; and there is much in her testimony to support this contention. But the effect of the whole evidence was for the jury, and there being a conflict, we cannot say, as matter of law, that they were not justified in coming to a conclusion the other way. Exceptions overruled.

Conflict in Evidence—Direction of Verdict.

NOTES.

Stoppage of Train after Announcement of Station—Invitation to Alight.—The announcement of the name of a station being usually intended to inform passengers that the train is approaching their destination, so that they may prepare to get off when the train stops, is not of itself an invitation to alight. Smith *v.* Georgia Pac. R. Co., 88 Ala. 538, 16 Am. St. Rep. 63; Richmond, etc., R. Co. *v.* Smith, 92 Ala. 237; East Tennessee, etc., R. Co. *v.* Holmes, 97 Ala. 332, 58 Am. & Eng. R. Cas. 252; Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; East Tennessee, etc., R. Co. *v.* Conner, 15 Lea (Tenn.) 254. See also Gonzales *v.* New York, etc., R. Co., 33 N. Y. Super. Ct. 57.

But if the train is soon thereafter brought to a full stop a passenger may safely conclude, in the absence of notice, that the train has arrived at the station, and he is justified in attempting to get off unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man that the train has not reached the proper landing-place. Central R. Co. *v.* Van Horn, 38

Notes

N. J. L. 133; Taber *v.* Delaware, etc., R. Co., 71 N. Y. 489. See also Chicago, etc., R. Co. *v.* Arnol, 144 Ill. 261; McNulta *v.* Ensch, 134 Ill. 46.

Same—Same—Question for Jury.—In Whittaker *v.* Manchester, etc., R. Co., L. R. 5 C. P. 464, *note* 3, BOVILL, C. J., said: "It is not a matter of law, but a question for the jury, whether the calling out of the name of a station amounts, under all the circumstances, to an invitation to alight."

See also, to like effect, Bridges *v.* North London R. Co., L. R. 6 Q. B. 377, L. R. 7 H. L. 213; Petty *v.* Great Western R. Co., L. R. 5 C. P. 461, *note* 1; Weller *v.* London, etc., R. Co., L. R. 9 C. P. 126; Taber *v.* Delaware, etc., R. Co., 71 N. Y. 489; Pennsylvania R. Co. *v.* White, 88 Pa. St. 327; Philadelphia, etc., R. Co. *v.* Edelstein, 23 W. N. C. (Pa.) 342; Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285; McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 1 Am. St. Rep. 706; East Tennessee, etc., R. Co. *v.* Conner, 15 Lea (Tenn.) 254.

Same—Same—Alighting in Daytime.—See Smith *v.* Georgia Pac. R. Co., 88 Ala. 538, 41 Am. & Eng. R. Cas. 143, 16 Am. St. Rep. 63; Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, 18 Am. & Eng. R. Cas. 176, 47 Am. Rep. 566.

Same—Same—Alighting in Dark.—Where, after a station has been announced, a train comes to a stop, and the passenger alights at such stopping place, the fact that the act took place on a dark night will be evidence tending to show that the passenger believed that he had reached his destination. Bridges *v.* North London R. Co., L. R. 7 H. L. 213; Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 1 Am. St. Rep. 706; Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452; East Tennessee, etc., R. Co. *v.* Conner, 15 Lea (Tenn.) 254; Philadelphia, etc., R. Co. *v.* McCormick, 1221 Pa. St. 427.

Moreover, in Richmond, etc., R. Co. *v.* Smith, 92 Ala. 237, it was held that where it appeared that about five o'clock on a dark morning, after the name of a station had been twice called by the porter, the train stopped at a water tank seventy-five yards from the station, where it very seldom stopped, and where the conductor did not know it would stop, and that the plaintiff, a passenger, was injured in stepping from the front platform, the car standing on a trestle, the passenger had, by the conduct of the company's employees, been induced to reasonably believe that the train was at the station, and that the court, without the intervention of a jury, properly pronounced the passenger free from contributory negligence.

But where, after a station had been announced, the train stopped in the night at a crossing, before proceeding to the station, it was

held that the circumstances and invitation were not such as reasonably to induce a passenger to believe that the train was at the station, where it appeared that the train halted but for a moment at the crossing, that there were no lights, no depot building, or any other landmark to indicate the station, and the passenger was acquainted with the location and knew of the crossing. East Tennessee, etc., R. Co. *v.* Holmes, 97 Ala. 332.

BARKMAN

v.

PENNSYLVANIA R. CO. *et al.*

(Circuit Court, D. New Jersey, August 10, 1898.)

Injury to Passenger while on Train of Connecting Carrier—Liability.—The railroad company selling the ticket cannot relieve itself from the responsibility of exercising reasonable care for the safe conveyance of the passenger by merely placing him in charge of another company.

Same—Pleading.—In such action, plaintiff having averred that the purchase of such ticket entitled him to ride upon the trains of the other company, it was not necessary for him to set out in the declaration the terms and conditions of the contract between the companies, they being matters of defense.

James B. Vredenburgh, for the motion.
Flavel McGee, opposed.

KIRKPATRICK, District Judge. The declaration in this case alleges that the defendant the Pennsylvania Railroad Company was in possession and control of a certain railroad running from Jersey City to Newark, engaged in the business of carrying passengers over the same for hire and reward, and that the defendant the Lehigh Valley Railroad Company was also possessed of and operating a certain locomotive engine and train of cars over the same railroad, and engaged in carrying passengers over the same; that the plaintiff purchased of the Pennsylvania Railroad Company, for a price, a ticket entitling him to a passage from

Case Stated.

*See notes at end of case.

Newark to Jersey City, in the trains of either of said companies passing over said railroad. It further alleges that the plaintiff, with his ticket, presented himself for carriage to a train of the defendant the Lehigh Valley Railroad Company, and that he was received thereon, and that afterwards, through the carelessness and negligence of the defendants in the management of said train, he was violently thrown from the train to the ground, and received thereby serious injury, to his damage $20,000, wherefor he brings his suit. To this declaration of the plaintiff the Lehigh Valley Railroad Company has entered a plea of not guilty, and the defendant the Pennsylvania Railroad Company has interposed a general demurrer.

The ground of demurrer is that the defendant the Pennsylvania Railroad Company was improperly joined in the suit, because the relations existing between itself and the plaintiff were merely contractual, and that, therefore, an action of tort would not lie against it. No authority is cited to support this contention. The contract of the railroad company was to carry the plaintiff between Newark and Jersey City, and if, through the carelessness or negligence of its servants or agents, or those who might be employed or premitted to execute the contract, the plaintiff was injured, he has his remedy in an action of tort against the the party so contracting. The railroad company selling the ticket cannot relieve itself from the responsibility of exercising reasonable care for the safe conveyance of the passenger by placing him in charge of another company. It makes no difference whether they carry the passenger themselves, or permit another to do so. Railway Co. *v.* Blake, 7 Hurl. & N. 987.

Injury to Passenger while on Train of Connecting Carrier—Liability.

It is also urged as ground of demurrer that the contract as annexed to the declaration does not show any agreement on the part of the Pennsylvania Railroad Company to carry the passenger on the trains of the Lehigh Valley Railroad Company, and that the tracks are by statute a public highway. There is a distinct averment in the declaration of the right of the plaintiff under the contract to use the trains of the Lehigh Valley Company. While the tracks are by statute made a public highway, "the utmost that can be claimed is that it [the statute] gave the right to other persons to use engines and cars on defendants' railway, subject to such rules as they might prescribe." Railroad Co. *v.* Salmon, 39 N. J. Law, 299. The terms and conditions

Same—Pleading.

upon which the Lehigh Valley Company was operating its locomotive engine and train are matters of defense. Whether they were such as to render the Pennsylvania Railroad Company liable to the plaintiff for the alleged negligent conduct of its co-defendant is an issue which cannot be determined on this demurrer. The demurrer should be overruled, with costs.

NOTES.

Partnership Arrangements between Carriers of Passengers—Liability for Loss or Injuries.—If the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation. But the arrangement must be in reality a partnership, with the incident of community of profit and loss. Waland *v.* Elkins, 1 Stark. 272. Laugher *v.* Pointer, 5 B. & C. 547; 12 E. C. L. 311; Fromont *v.* Coupland, 2 Bing. 170; 9 E. C. L. 366; Wylde *v.* Northern R. Co., 53 N. Y. 157; Cobb *v.* Abbott, 14 Pick. (Mass.) 289.

The leading case upon this subject in this country, is that of Bostwick *v.* Champion, 11 Wend. (N. Y.) 571; 18 Wend. (N. Y.) 175; 31 Am. Dec. 376, the facts of which were as follows: Three persons ran a line of stage coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own carriages and horses, hiring drivers and paying the expenses of his own section; but the money received as fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each; this was held to be such a division of the profits among the proprietors of the several sections as to make them partners as to third persons.

But CHANCELLOR WALWORTH, who gave the only written opinion in the Court of Errors (Champion *v.* Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376), said that, "The case would be entirely different, if each stage owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof, and was only to act as agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case, there would be no joint interest, and no liability to third persons as partners."

So, where R. owned and was running one steamboat, and D. owned and was running another, and it was agreed between them that at the end of the season, if the earnings of either boat, less

running expenses, should exceed those of the other, less running expenses, the excess should be divided among them, it was held that this did not constitute them partners as to third parties. Fay *v.* Davidson, 13 Minn. 523.

But the fact that each sells through tickets, deducting its own share of the price paid for the same, and accounting to the other companies for their shares, the price being fixed according to a tariff established by each company as to its own road, will not constitute them partners. Croft *v.* Baltimore, etc., R. Co., 1 McArthur (D. C.) 492; Straiton *v.* New York, etc., R. Co., 2 E. D. Smith (N. Y.) 184; Hartan *v.* Eastern R. Co., 114 Mass. 44.

Nor will the mere appointment of a common agent at each end of the route to receive fares and issue through tickets, have such an effect. Ellsworth *v.* Tartt, 26 Ala. 733, 62 Am. Dec. 749; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222; Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26.

In Howe *v.* Gibson, 3 Tex. Civ. App. 263, it was held that where two connecting roads are operated as one continuous line under one management, with the same employees, and are, so far as the public can observe, one line, and use coupon tickets, compelling a continuous passage from stations on one road to stations on the other, both are liable in damages to a passenger who purchases such a ticket and is wrongfully compelled to alight from the train at a point distant from the station to which he has paid his passage.

Through Tickets over Connecting Lines—Liability—English Doctrine.—The English doctrine as to the liability of a carrier selling a through ticket over several connecting roads, to a point beyond its own line is, that the carrier is liable for the performance of the contract of transportation through to the point of destination, and must therefore respond in damages, in the event of the injury or delay of a passenger before reaching that point. Mytton *v.* Midland R. Co., 4 H. & N. 615; Great Western R. Co. *v.* Blake, 7 H. & N. 987; Bristol, etc., R. Co. *v.* Collins, 7 H. L. Cas. 194; Buxton *v.* North-Eastern R. Co., L. R., 3 Q. B. 549; Kent *v.* Midland R. Co., L. R., 10 Q. B. 1.

Same—Doctrine in United States.—And the English doctrine is upheld in some of the United States. Croft *v.* Baltimore, etc., R. Co., 1 McArthur (U. S.) 492; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 337, 76 Am. Dec. 749; Najac *v.* Boston, etc., R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686; Wilson *v.* Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654; Weed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; Ward *v.* Vanderbilt, 4 Abb. App. Dec. (N. Y.) 521; Hart *v.* Rensselaer, etc., R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Burnell *v.* New York Cent., etc., R. Co., 45 N. Y. 184, 6 Am.

Notes

Rep. 61; Cary *v.* Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35; Candee *v.* Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566; Carter *v.* Peck, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604; Wolff *v.* Central R. Co., 68 Ga. 653, 6 Am. & Eng. R. Cas. 441, 45 Am. Rep. 501; Central R. Co. *v.* Combs, 70 Ga. 533, 18 Am. & Eng. R. Cas. 298, 48 Am. Rep. 582.

Contra.—But the most generally accepted doctrine in the United States is, that, in the absence of contract making it responsible, the carrier in selling the ticket acts merely as the agent of the other lines, and there is no extra-terminal liability, the rights of the passenger, and the duty and responsibility of the several companies over whose roads he is entitled to passage, being the same as if he had purchased a ticket at the office of each company constituting the through line. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 18 Am. & Eng. R. Cas. 339, 54 Am. Rep. 238; Chicago, etc., R. Co. *v.* Fahey, 52 Ill. 81, 4 Am. Rep. 587; Knight *v.* Portland, etc., R. Co., 56 Me. 235, 96 Am. Dec. 449; Furstenheim *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 238; Mosher *v.* St. Louis, etc., R. Co., 127 U. S. 390; Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. (Tenn.) 852; Hood *v.* New York, etc., R. Co., 22 Conn. 1; Young *v.* Pennsylvania R. Co., 115 Pa. St. 112, 28 Am. & Eng. R. Cas. 114; Hartan *v.* Eastern R. Co., 114 Mass. 44; Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424; Pennsylvania Cent. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; Poole *v.* Delaware, etc., R. Co., 35 Hun (N. Y.) 29; Milnor *v.* New York, etc., R. Co., 53 N. Y. 365; Kessler *v.* New York, etc., R. Co., 61 N. Y. 538; Lundy *v.* Central Pac. R. Co., 66 Cal. 191, 18 Am. & Eng. R. Cas. 309, 56 Am. Rep. 100.

In Nashville, etc., R. Co. *v.* Sprayberry, 9 Heisk. (Tenn.) 852, McFarland, J., in delivering the opinion of the court, said: "The theory that the company selling the ticket shall be held, from this alone, to have actually contracted to carry the passenger over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, a sort of legal fiction, and contrary, in some cases, at least, to the truth of the case. Assuming that in fact the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers, except the arrangement to sell through tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly what may be contrary to the truth; *i. e.*, that the other companies are but the agents and servants of the first?"

In Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469, it was held that while one of several connecting lines may lawfully contract as principal for the carriage of passengers over the entire route, whether it does so contract is a matter to be determined by evidence.

MATHEWS

v.

ATCHISON, T. & S. F. R. Co.

(*Supreme Court of Kansas, Dec. 10, 1898.*)

Connecting Carriers—Injury to Passenger—Liability.*—Where one railroad company, owning most of the stock of another railroad company, and being desirous of utilizing it as a connecting line for through business, enters into a through-traffic agreement with it, by the terms of which a division of earnings on such traffic is stipulated for, and matters pertaining to through rates and other like business are intrusted in great part to the management of the first-mentioned company, which upon its part undertakes to guaranty the bonds, and generally to finance the affairs of the last-mentioned company, but the last-mentioned company retains the entire management of its own train service and operating department, employs, controls, and discharges its own employees, and pays the expenses of such department; *held*, that as to a passenger riding over the line of the last-mentioned company, upon a through ticket sold by the first-mentioned company, containing a clause limiting responsibility for injuries en route to those occurring on the line of such company, damages cannot be recovered from the selling company for injuries received upon the line of the other one, through the negligence of its employees.

(Syllabus by the Court.)

ERROR by plaintiff from Wyandotte county court of common pleas. *Affirmed.*

T. P. Anderson, *Ben S. Henderson*, and *Geo. W. Littick*, for plaintiff in error.

A. A. Hurd and *Mills, Smith & Hobbs*, for defendant in error.

*See Barkman *v.* Pennsylvania R. Co. *et al.* (C. C. N. J.), *ante*, and *note*.

Mathews *v.* Atchison, etc., R. Co

DOSTER, C. J. This was an action for damages against the Atchison, Topeka & Santa Fe Railroad Company, for injuries received on the line of the Atlantic & Pacific Railroad Company, on account of the alleged negligence of the latter. The question for determination is, was there such identity of interest or other character of relationship between the two companies as to make the one first named liable for the torts of the other? Upon this question a number of written instruments—traffic agreements, to which the two companies and others were parties—were introduced in evidence, and, in addition, quite an amount of oral testimony explanatory of the action taken by the companies under and in pursuance to the traffic agreements was introduced, which testimony shows the practical interpretation of the agreements made by the several parties thereto. Elaborate findings of fact were made by the court below. These we have read, together with the documentary and oral evidence. Stated in quite brief terms, though with sufficient fullness to disclose all pertinent matter, the facts are as follows:

The Atchison, Topeka & Santa Fe and the St. Louis & San Francisco Railroad Companies each have lines projected and partially completed to the Pacific Coast, that of the former terminating at Albuquerque, N. M., that of the latter at a point on the line of the former in the Arkansas Valley, in Kansas. The Atlantic & Pacific Railroad Company has a line beginning at Albuquerque, N. M., and extending, partially by construction and partially by the lease of another line, to Barstow, Cal., at which place connection is made with another road to San Francisco and other points on the coast. The line of the Atlantic & Pacific Railroad Company furnishes to the Atchison, Topeka & Santa Fe and the St. Louis & San Francisco Companies the shortest and most desirable route for through traffic to the Pacific Coast; and the two companies last named were desirous that the company first named should extend its road to the coast, in order to accommodate the through traffic they were able to secure. The two companies last named therefore bought and held seven-eighths of the stock of the former, and together they undertook to finance its affairs, by guarantying its bonds and maintaining it in a solvent condition. The agreements referred to set out in detail the schemes agreed upon for upholding the credit and managing the finances of the Atlantic & Pacific Company. They provided for divisions of earnings upon through business, and for the application of the earnings of the At-

lantic & Pacific Company to the payment of the obligations guarantied by the other companies. They also provided for financing the affairs of the one company, under the management and in the interest of the other two companies, to the end of securing them against loss on their guaranty of the bonds of the Atlantic & Pacific Company. The primary object of these agreements would appear to be the mutual benefit of the three companies through an interchange of traffic, and, as a means to that end, upholding the credit of the Atlantic & Pacific Company, and its maintenance in a solvent condition, and as an independent company. None of these agreements seem to have or to seek the effect of merging the actual existence of the Atlantic & Pacific Company into those of the other two, or seem to have or to seek the effect of reducing the one to the character of a nominal corporate entity, or seek to establish relations of principal and agent between the several companies, or relations of partnership between them in the profits and losses of the business of railroading. They seek and seem only to have the effect of putting the finances of the one under the control and management of the others, to the end and for the purpose stated. None of these agreements provided for the control or management of the operating department of the Atlantic & Pacific Company by the others, except that in some particulars the adjustment of time cards and train schedules was made to devolve upon the others. The employment, supervision, and discharge of employees of the Atlantic & Pacific Company, and the payment of the expenses of the operation of its line from Albuquerque to its western terminus, were left to the managers of its own operating department, except that, by one of the agreements, some of the employees at Albuquerque, and to an extent the terminal yards at the station, were placed under the control of the Atchison, Topeka & Santa Fe management. By the terms of one of the agreements, it was stipulated as follows: "The Western Division of the Atlantic & Pacific Railroad shall be under the management of the Atchison Company;" by another stipulation, it was agreed that "the Central Division of the Atlantic & Pacific Railroad shall be under the management of the San Francisco Company." However, the context of this agreement shows that the language quoted refers, not to the train service or the operating department of the Atlantic & Pacific Company, but to its management in respect to rates and traffic arrangements generally. The quoted provisions, read in full,

show that they were inserted for the purpose of securing equality of right between the Atchison, Topeka & Santa Fe and the St. Louis & San Francisco Companies in respect to rates, and to prevent discrimination by the Atlantic & Pacific Company against either of the other companies, and not to confer upon either of them any supervision over the operating department of the Atlantic & Pacific Company.

January 3, 1893, the plaintiff in error purchased of the agent of the Atchison, Topeka & Santa Fe Railroad Company, at Kansas City, Mo., a through, round-trip coupon ticket from that station to San Francisco, and return. The coupons called for passage over the Atchison, Topeka & Santa Fe, the Atlantic & Pacific, the California Southern, and the Southern Pacific Railroads. This ticket, as usual in such cases, contained a contract for passage made up of various stipulations, one of which was in the following language: "In selling this ticket for over other roads, this company acts only as agent; and assumes no responsibility beyond its own line." It concluded with an agreement in the following language: "In consideration of the reduced rate at which this ticket is sold, I hereby agree to accept all the provisions of the above contract." This was signed by the plaintiff in error as purchaser. Starting upon her trip, she went aboard a car called a "tourist sleeper," owned by the Pullman Palace-Car Company, but which the defendant in error and its connecting lines were in the habit of using for transportation, without change, of their through passengers. At a point on the line of the Western Division of the Atlantic Pacific Railroad, she was injured by the negligence of the employees of that road. She sued the Atchison, Topeka & Santa Fe Company for damages on account of the injuries received by her, and, as before stated, the question relates, under the facts above set forth, to the liability of the one company for the negligent acts of the other. The court below held against her right of recovery, and from its judgment she prosecutes error to this court.

Her claim of error, however, is unavailing. In Railroad Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, it was held that "the sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance,

and for all loss on connecting lines the same as on its own." In this case, however, in addition to those elements of the transaction which, as above stated, evidence a contract of liability for through passage, the conditions, limitations, and other circumstances show that a contract of liability for through passage was not entered into by the defendant company. The contract for passage itself—that is, the ticket,—in plain terms disavows responsibility for the acts and conduct of the connecting lines, and limits the responsibility of the defendant company to passage over its own line. We do not wish to be understood as holding that the acceptance of this contract of passage, and the signature of the plaintiff in error to its terms, of necessity relieved the defendant in error of liability. Tickets such as the one in question are in stereotyped forms prepared by the companies themselves. The passenger has no alternative but to purchase, or refrain from the contemplated journey. The terms of the agreement of passage cannot be negotiated for by the passenger. They must be accepted as proposed by the company itself. As a rule, these tickets, with their incident stipulations of limited liability for passage, are not read by the passenger before purchase, nor, as a rule, do time and opportunity exist for reading them. They are imposed by the company upon the passenger as a condition to the transportation facilities desired. If they contain no illegal or exceptionally onerous conditions, violative of the obligations of the carrier, the passenger will be bound by their terms; otherwise, not. In this case the question whether the ticket or contract of passage was one which the company might lawfully propose, and by which the passenger would be bound, has not been raised, nor do we mean to intimate that it could be successfully raised. We have only thus spoken to avoid misconception of the statement made by us that the contract of passage, being in this case unlike the one in the case of Railroad Co. *v.* Roach, *supra*, shown in evidence, and being, as it was, a contract of limited liability, the plaintiff in error can claim nothing upon the mere ground of the purchase of a through ticket over several connecting lines. In the Case of Roach it was stated that arrangements in the form of traffic agreements might be made, and frequently were made, between companies owning connecting lines, which would constitute them partners as to third persons; and this is undoubtedly true, but we are unable to view the agreements entered into between the defendant in error and

the Atlantic & Pacific Company as a partnership arrangement as to patrons of their connecting roads. There was not that merger of different interests, that blending of different individuals into a whole for the attainment of a single purpose and object, that mutual sharing of burdens and benefits, which constitute a partnership. This conclusion, however, cannot be argued out in view of the prolix and technically worded traffic agreements before spoken of without extending this opinion to great length. The facts, as we have stated them, are generalizations, correctly drawn, as we believe, from the oral evidence, and from the many pages of matter which these various agreements contain. We attach much importance to the fact that the Atlantic & Pacific Company retained in these agreements the management of its own operating department. It was through the negligence of the employees of that particular department the injuries of the plaintiff in error were received. Cases may occur in which the potential existence of one railroad company is so nearly absorbed in or dominated by that of another company that the maintenance by them of separate organizations, or separate operating departments within their respective organizations, becomes a mere fiction. This case, however, under the facts stated, is not one of the kind conjectured.

No great weight, in our judgment, is to be attached to the fact that the Atchison, Topeka & Santa Fe Railroad Company was a large stockholder in the Atlantic & Pacific Company, or was the guarantor of its bonds. Such facts may constitute controlling reasons in the judgment of the management of the two companies for entering into close traffic agreements, but they do not of themselves constitute reasons for holding the two companies to be partners, or one company to be the servant or agent of the other. In the case of Railroad Co. v. Davis, 34 Kan. 209, 8. Pac. 530, it was held that "where a great railroad company, operating a long line of road in the state, aids, as stockholder or bondholder, or as the guarantor of bonds, another railroad company in constructing its road, under the provisions of chapter 105, Laws 1873, such auxiliary company does not become, on account of such aid, the servant or agent of the parent company; and the parent company is not, on account of being such stockholder or bondholder, or guarantor of bonds, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name." The principle involved in this decision applies in the determination of the point in question.

If the one company cannot be held liable for the negligence of the other in constructing the road of the latter, it cannot, for the same reason, be held liable for the management or operation of the latter. The judgment of the court below is affirmed. All the justices concurring.

HAVER

v.

CENTRAL R. CO.

(*Court of Errors and Appeals of New Jersey, Nov. 14, 1898.*)

Passenger Assaulted by Servant Not in Line of Duty—Liability of Company.*—Plaintiff took his seat in the passenger compartment of defendant's baggage car, and the baggage master demanded his fare; and, upon plaintiff's refusal to give it to him, he called the conductor, to whom plaintiff paid his fare. The baggage master then, in the absence of the conductor, assaulted plaintiff. *Held*, that nonsuit should not have been granted.

ERROR by plaintiff, to Hudson county circuit court. *Reversed.*

The declaration in this case is in tort. It avers that the plaintiff boarded one of the trains of the defendant, the Central Railroad Company, a common carrier for the transportation of passengers and baggage between the city of Elizabeth and Bayonne, and that he did thereupon pay the said defendant his fare for passage; that while a passenger as aforesaid, and traveling in the train of the said company, he was then and there insulted and abused by one Simeon D. Apgar, a baggage master in the employ of the defendant, and with force and arms was, without cause or provocation, assaulted by the said employee of said company, whereby the plaintiff was injured, wherefore he claims damages in the sum of $10,000. The facts as they appeared in evidence were that the plaintiff in December last took passage in the defendant's cars at Elizabethport for Bayonne, Bergen Point; that he took his seat in the passen-

*See notes at end of case.

ger compartment of the baggage car; that the baggage master immediately demanded his fare, which the plaintiff refused to give to him, and so the baggage master passed along and called the conductor, and the conductor came in; that as soon as the conductor came in, he paid him his fare. Then the plaintiff testified: "As I was paying my fare the baggage master stood by the door, and the conductor went out of the door; and he passed along and said, 'You son of a bitch! I am notioned to punch the face off you;' and he grabbed hold of me and shook me, where I sat in the seat. The other passengers interfered, and he broke away from me. He was in the center. He tackled me again, and struck me with all the vengeance he had. I avoided the blow by keeping close to him, and he ran me along the aisle, and slammed me against the water cooler. Finally he let go of me, and threw me into the aisle of the car, against the other seats." On this evidence on the part of the plaintiff the court granted a nonsuit, whereupon the plaintiff sued out this writ of error.

Roberson & Demarest, for plaintiff in error.
John L. Conover, for defendant in error.

DEPUE J. (after stating the facts). A master is liable for the trespass of his servant committed within the scope of his authority, even though in exercising his authority he use unnecessary violence; but for a trespass committed by the servant willfully, or of his own malice, under color of discharging the duties of his employment, or where he has gone beyond the line of his duty to commit a trespass, the master will not be liable. This rule of law, where the relation of master and servant exists, uncontrolled by other circumstances, is well settled. It was so decided by this court in Brokaw *v.* Transportation Co., 32 N. J. Law, 328. The action in that case was in trespass, for ejecting the plaintiff with force and arms out of the car of the railroad company "while he was traveling in said car," and the case was before the court on demurrer. Whether the plaintiff was lawfully a passenger in the company's car, and entitled to the privileges and protection due from the carrier to its passengers, does not appear in the case. The plaintiff in this case became a passenger in the defendant's car, and at the time of this occurrence had paid his fare to the conductor, and was entitled to all the rights, privileges, and protection which the law accords to passengers, and subject to the duties and

liabilities which the law imposes on a carrier for the safety of its passengers. The case now before the court depends, not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances, and the number and character of persons on board. Cooley, Torts, 644; 5 Am. & Eng. Enc. Law. (2d Ed.) 541. In the application of this principle, the grade of the employee by whom the injury was done, or the scope of his employment, is immaterial. The courts of England seem to apply to such a situation the ordinary rule that prevails as between master and servant. Allen *v.* Railway Co., L. R. 6 Q. B. 65; Walker *v.* Railroad Co., L. R. 5 C. P. 640; Railway Co. *v.* Broom, 6 Exch. 314. In Isaacs *v.* Railroad Co., 47 N. Y. 122, the court of appeals of New York held that the defendant was not liable for the act of the conductor in pushing a passenger from the car while it was in motion. The decision was put upon the ground that the act of the conductor was a wanton and willful trespass, not in the performance of any duty to, or any act authorized by, the defendant, and therefore the defendant was not liable. This case was overruled in Stewart *v.* Railroad Co., 90 N.Y. 588. In that case the plaintiff, while a passenger on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor. It was held by the court that the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting in the scope of his employment did not apply as between a common carrier of passengers and a passenger, and the principle was affirmed that a common carrier undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty

which the carrier owes to the passenger. Isaacs v. Railroad Co. was set aside, in the decision of this case, on the ground that that case had been determined by the court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. Stewart v. Railroad Co. was affirmed and followed in Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. 319, in which it was held that, whatever be the motive that incites the servant to commit an unlawful and improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences. This liability was deduced from the obligation of the carrier to protect the passenger against any injury from negligence or willful misconduct of its servants while it performed its contract to carry. In some of the cases, in defining the liability of a carrier of passengers for the willful acts of his servants, the expression "within the scope of employment," or "in the line of duty," is used. Neither of these expressions, in the usual sense, is applicable to this subject, except as descriptive of circumstances under which the liability of the carrier is unchallenged. Thus in Steamboat Co. v. Brockett, 121 U. S. 638, 7 Sup. Ct. 1039, the court held that a common carrier undertakes absolutely to protect his passengers against the misconduct or negligence of his own servant employed in executing the contract of transportation, and acting within the general scope of his employment. In that case the action was founded upon an assault committed by a servant upon a passenger in enforcing rules and regulations of the company, and consequently the act was done while the servant was acting within the general scope of his employment. The case did not call for the consideration of the liability of the master under other circumstances; and it will be observed that MR. JUSTICE HARLAN, in delivering the opinion of the court, quotes with apparent approbation the principle adopted in Stewart v. Railroad Co., 90 N. Y. 588–591, that a common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract. The expressions above quoted, used in the cases, seem to mean nothing more than that the carrier is not liable for the acts of the servant when

he is off from the duties of his employment, and consequently not employed in executing the carrier's contract of transportation. In Pendleton *v.* Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922, the suit was against the owner of a steamboat on which the plaintiff was a passenger. A dispute arose between the plaintiff and the clerk about the payment of fare. Subsequently the plaintiff was assaulted by the clerk on board the vessel, and during the same trip. The defense was that the clerk was not at the time of the assault acting in the course of his employment, aud therefore the owner of the vessel was not responsible for his acts. MR. JUSTICE CLIFFORD, in overruling the defense, said that "the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy." Speaking of the defense, the learned judge said: "Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agent employed in the management of the ship or other conveyance, and for the fulfillment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation." The above extract from Pendleton *v.* Kinsley is quoted with approbation in Bryant *v.* Rich, 106 Mass. 180–189. The liability of the carrier in such cases rests upon the principle that he has engaged to perform certain duties, and has selected his own servants for the performance of those duties, and hence an assault by an employee is a breach of the duty of the carrier to his passenger. This subject is discussed by MR. ELLIOTT as follows: "There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term 'scope of employment,' or 'line of duty' in a different sense in different cases, or to a failure to place the decision on the correct ground. It is

not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the willful act of an employee or not. * * * Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, R. R. § 1638. The cases on this subject in the courts of our sister states are not harmonious, but the great weight of authority is in favor of the doctrine declared by the New York cases which have been cited. The decisions are collected in an elaborate note to 5 Am. & Eng. Enc. Law (2d Ed.) 541–548. It is quite unnecessary to reproduce them here. The doctrine that a common carrier of passengers undertakes to carry a passenger safely and securely is nowhere impugned, and to apply to assaults upon a passenger by one of its employees the doctrine that rests solely upon the relation of principal and agent is to overlook the peculiar obligation that rests upon the carrier of passengers, and the liability which results from the failure to discharge that obligation. In actions against common carriers, the plaintiff may sue in *assumpsit* on the contract to carry, or in case on the common-law duty. 1 Saund. Pl. & Ev. 325. Under the evidence appearing on the record, the nonsuit should not have been granted, and the judgment should be reversed.

NOTES.

Injuries to Passengers From Malicious Acts of Employees—Liability of Master—General Doctrine.—It has been frequently held that a carrier of passengers is liable for the tortious acts of its servants, even though wilful or malicious, if done within the scope of their employment.

United States.—Gallena *v.* Hot Springs R. Co., 13 Fed. Rep. 123.

Alabama.—Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 328.

Illinois.—St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 363; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126.

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Indiana.—Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; Indianapolis, etc., R. Co. *v.* Anthony, 43 Ind. 183; Pittsburgh, etc., R. Co. *v.* Theobald, 51 Ind. 247; Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563; Wabash R. Co. *v.* Savage, 110 Ind. 156.

Iowa.—McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kansas.—Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507; Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715.

Louisiana.—Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417, 8 Am. St. Rep. 538.

Maryland.—Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277.

Massachusetts.—Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200; Coleman *v.* New York, etc., R. Co., 106 Mass. 160; Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 143 Mass. 228.

Minnesota.—Cain *v.* Minneapolis, etc., R. Co., 39 Minn. 297.

Missouri.—McGinnis *v.* Missouri Pac. R. Co., 21 Mo. App. 399; Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201; Travers *v.* Kansas Pac. R. Co., 63 Mo. 421; Brown *v.* Hannibal, etc., R. Co., 66 Mo. 589.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Ohio.—Pittsburg, etc., R. Co. *v.* Slusser, 19 Ohio St. 157; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

Pennsylvania.—Pennsylvania R. Co. *v.* Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.

Texas.—Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

Wisconsin.—Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495, 39 Wis. 636, 42 Wis. 654; Fick *v.* Chicago, etc., R. Co., 68 Wis. 469, 60 Am. Rep. 878.

Same—Same—Special Liability of Carriers.—Many of the latest and best-considered cases seem to recognize a distinct rule as applicable to carriers of passengers, and hold them liable for the willful and malicious acts of their servants or agents resulting in injuries to passengers, whether done in the line of their employment or service, or not, if done during the course of the discharge of their duty to their employers which relates to the passengers.

United States.—Pendleton *v.* Kinsley, 3 Cliff. (U. S.) 416.

Illinois.—Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296; Chicago, etc., R. Co. *v.* Barrett, 16 Ill. App. 17; Coggins *v.* Chicago, etc., R. Co., 18 Ill. App. 620. Where a passenger was struck in the face with a lantern by a brakeman whom he had accused of stealing his watch, it was held that the passenger might recover from the railroad company. PILLSBURY, J., said: "It is undoubtedly true, that where the employee goes outside of the line of his employment, and for

purposes of his own inflicts an injury upon the person of one who has no claim upon the employer arising out of any special relation existing between them, being a stranger to the master, the principle contended for is properly applied and has ever been enforced as a rule of the common law, but it does not appear to us that it should be extended so as to embrace a case where the employee of a common carrier engaged in operating the train commits a tort upon a passenger upon such train. In every contract for carriage the carrier undertakes, not only that the utmost vigilance, care, and skill shall be exercised to safely transport the passenger to his destination, but that during the passenger's transit he shall be treated humanely, and protected from all dangers from whatever source arising so far as the efforts of the carrier or his servants can be made available for the protection of such passenger." Chicago, etc., R. Co. *v.* Flexman, 9 Ill. App. 250.

Indiana.—Where a passenger who has bought a ticket and is on his way to take the train is assaulted and beaten by a gateman in the employ of the railroad company, he may recover damages. GAVIN, J., delivering the opinion of the court said: "One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants; nor does the question of its liability for a breach of this duty depend upon whether or not the servant in the performance of the act is within the scope of his employment." Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202.

Kentucky.—Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Winnegar *v.* Central Pass. R. Co., 85 Ky. 547.

Maine.—Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Massachusetts.—Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311.

Minnesota.—Conger *v.* St. Paul, etc., R. Co., 45 Minn. 207.

Missouri.—Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17; Randolph *v.* Hannibal, etc., R. Co., 18 Mo. App. 609; Eads *v.* Metropolitan St. R. Co., 43 Mo. App. 536.

North Carolina.—It is the duty of a common carrier not only to carry its passengers safely, but to protect them from ill-treatment from its servants, other passengers, and intruders, and it is liable for an injury or ill-treatment committed by its servants, whether in the line of their employment or not. White *v.* Norfolk, etc., R. Co., 115 N. Car. 631, 44 Am. St. Rep. 489.

Tennessee.—Springer Transp. Co. *v.* Smith, 16 Lea (Tenn.) 498.

Texas.—Dillingham *v.* Anthony, 73 Tex. 47; International, etc., R. Co. *v.* Kentle (Tex. 1883) 16 Am. & Eng. R. Cas. 337. In Houston, etc., R. Co. *v.* Washington, (Tex. Civ. App. 1895) 30 S. W. Rep.

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719, the court said: "And it [a carrier of passengers] cannot invoke the rule that the master is not liable for an injury resulting from the wilful and malicious acts of his agent not done in the course of his employment; that rule does not apply when the injury is inflicted upon a passenger by the carrier's servant."

West Virginia.—Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 25 Am. St. Rep. 901; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827.

Wisconsin.—In Craker *v.* Chicago, etc., R. Co., 36 Wis, 657, it was held that a female passenger who had been kissed by the conductor could recover damages from the railroad company in whose employ the conductor was. RYAN, C. J., delivering the opinion of the courts said: "But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

Same—Same—Existence of Distinct Doctrine as to Carriers Denied.—But, it has been expressly held that unless the wilful or malicious act was done within the scope of the employment of the servants of the carrier, no recovery can be had for an injury resulting therefrom. Emerson *v.* Niagara Nav. Co., 2 Ont. Rep. 528; Cunningham *v.* Seattle Electric R., etc., Co., 3 Wash. 471.

Same—Same—Same—Illustrations.—Where a passenger was violently assaulted and beaten by a servant of a railroad who had general charge and control of the car in which said passenger had taken a seat, it was held that the railroad company was not liable. FRAZER, J., in delivering the opinion of the court, said: "It is not to be understood, however, that the master is never liable for the wilful and malicious acts of the servant unless he has directed those specific acts to be done. The rule is not so broad as that. If the

act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment—if it was essential as a means to attain the end directed by the master, and was intended for that purpose, then it was implied in the employment, and the master is liable, though the servant may have executed it wilfully and maliciously. But when it is unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is, therefore, not liable." Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70. But this case does not seem to be recognized as stating the correct doctrine even in this jurisdiction. Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202.

Where a passenger was struck with a hatchet by a servant of the railroad, whose duty it was to check trunks, in consequence of abuses and insulting remarks made by the passenger to said servant, it was held that the railroad company was not liable, upon the ground that the act of the servant in thus assaulting the passenger was not within the scope of his employment. Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

Same—Same—New York Cases Following The General Doctrine. —In Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455, it was held that a carrier was not liable for the wilful or malicious acts of its servants, and that a passenger who was injured by the use of excessive force when he was being rightfully ejected from a train of the defendant's could not recover.

In Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474, damages were recovered in an action against a carrier where it appeared that a conductor in charge of one of the defendant's trains wilfully detained it and thus caused injury to the health of a female passenger.

In Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286, the defendant was held liable in damages for the death of a passenger who was violently ejected from the car while in motion, by the conductor, because he refused to pay his fare, on the ground that on a previous day he had paid a fare without being carried to his destination.

In Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293, *explaining* Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455, a passenger was allowed to recover where he was thrown from a train by a servant of the carrier, who claimed that he was drunk and disorderly. *Followed* in Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448.

Notes

In Peck *v.* New York Cent., etc., R. Co., 70 N. Y. 587, *following* the last named case, a passenger who was injured by the use of excessive force by a servant who was removing him from one car to another, under the regulations of the carrier, was allowed to recover.

In Schultz *v.* Third Ave. R. Co., 46 N. Y. Super. Ct. 211, 89 N. Y. 242, a boy who was pushed from the car by a conductor before asking him for his fare, because he made an insulting gesture, was allowed to recover.

In Flynn *v.* Central Park, etc., R. Co., 49 N. Y. Super. Ct. 81, it was held, where the conductor of a street car pushed a passenger with whom he had a dispute about the payment of his fare, off the car, that the carrier was liable, on the ground that such act was within the scope of the conductor's employment. This case *cites* as an authority Hoffman *v.* New York Cent.. etc., R. Co., 87 N. Y. 31, 41 Am. Rep. 337, in which the plaintiff was a trespasser, and ignores the previously decided cases as to passengers.

In Parker *v.* Erie R. Co., 5 Hun (N. Y.) 57, it was held that a conductor was not acting in the discharge of his duty when he used insulting language to a passenger, and that for such conduct the carrier incurred no liability.

In Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418, it was held that the defendant was not liable where a passenger who requested the conductor to stop a street car in order that she might alight, and refused to alight until a full stop was made, was thrown violently from the car and injured. *Followed* in Molloy *v.* New York Cent., etc., R. Co., 10 Daly (N. Y.) 453.

Same—Same—New York Cases Recognizing Distinct Doctrine as to Carriers.—Where a passenger on one of the defendant's street cars was unjustifiably attacked and beaten by the driver, who was also acting as the conductor, because said passenger interfered to prevent him from beating a newsboy who had gotten upon the car, it was held that the defendant was liable, the court holding that the rule relieving a master from liability for a malicious injury inflicted by a servant when not acting within the scope of his employment did not apply as between a common carrier of passengers and a passenger. Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185, *distinguishing* Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418, *followed* in Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433; Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 28 Am. St. Rep. 632, *affirming* 60 Hun (N. Y.) 579, 39 N. Y. St. Rep. 23; Simonin *v.* New York, etc., R. Co., 36 Hun (N. Y.) 214; Lyons *v.* Broadway, etc., R. Co., (City Ct.) 32 N. Y. St. Rep. 232; Hepworth *v.* Union Ferry Co., 62 Hun (N. Y.) 257.

In an action brought against a railroad company by a passenger

who had been assaulted by one of the company's servants, the court said: "The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract." Dwinelle *v.* New York Cent., etc., R. Co., 120 N. Y. 117, 17 Am. St. Rep. 611, *following* Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

Same—Same—English Doctrine.—It seems to be the rule in England that no liability is incurred by a carrier when a passenger is injured by the wilful or malicious tort of its servant unless he was acting within the scope of his employment. Bayley *v.* Manchester, etc., R. Co., L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. N. S. 366, *affirming* L. R. 7. C. P. 415; Seymour *v.* Greenwood, 7 H. & N. 355, *affirming* 6 H. & N. 359; Moore *v.* Metropolitan R. Co., L. R. 8 Q. B. 36; Roe *v.* Birkenhead, etc., R. Co., 7 Exch. 36; Goff *v.* Great Northern R. Co., 3 El. & El. 672, 107 E. C. L. 672; Poulton *v.* London, etc., R. Co., L. R. 2 Q. B. 534; Edwards *v.* London, etc., R. Co., L. R. 5 C. P. 445; Allen *v.* London, etc., R. Co., L. R. 6 Q. B. 65. See Eastern Counties R. Co. *v.* Broom, 6 Exch. 314; Walker *v.* South Eastern R. Co., L. R. 5 C. P. 640.

JOHNSON

v.

SOUTHERN RY. CO.

(*Supreme Court of South Carolina, Sept. 28, 1898.*)

Injuring Passenger's Escort Alighting from Train—Negligence.*—In an action by the escort of a female passenger for injuries

*See Whitley *v.* Southern Ry. Co. (N. Car.), *ante*, and *note*.

received by plaintiff while alighting from the train, while it was in motion, it appeared that it was apparent that the passenger needed assistance, and that the conductor, though standing near enough, probably, to hear her when she requested plaintiff's assistance, did not offer to assist her; that plaintiff, when about to alight, told the conductor he wanted to alight, and the conductor told him to do so, though the train was in motion; and that the train was behind time, and was only stopped for about half a minute. *Held*, that such evidence tended to show negligence on the part of defendant.

Same—Instructions.—The complaint containing a general charge of negligence in starting the train, and defendant not having made a motion to have it made more specific, and plaintiff having testified that it either ran over a joint, or made a jerk, it was not error to charge as to the liability of defendant if the car was negligently started with a jolt, and plaintiff was injured thereby.

APPEAL by defendant from Saluda county circuit court of common pleas. *Affirmed.*

B. L. Abney and *John P. Thomas, Jr.*, for appellant.
Tompkins & Wells and *S. McG. Simkins*, for respondent.

McIVER, C. J. This was an action to recover damages for injuries sustained by plaintiff in alighting from defendant's train, —caused, as alleged, by the negligence of the defendant company. The case, in brief, was this: The plaintiff bought a ticket for his wife from defendant's agent at Monetta, a station on defendant's line, which entitled her to be carried as a passenger from that station to Augusta, Ga. The train was behind time in reaching Monetta, and the plaintiff's wife, who was incumbered with heavy baggage,—a valise,—needed assistance in boarding the train, which not being afforded by any of the railroad employees, her husband, the plaintiff, undertook to carry her valise on the train for her, and, in leaving the train while it was in motion, fell or was thrown to the ground, thereby sustaining the injuries complained of. At the close of the testimony on the part of the plaintiff, the defendant moved for a nonsuit upon the ground that there was no testimony tending to show any negligence on the part of the defendant company. The motion was refused by his honor, JUDGE KLUGH, saying: "The testimony is that the plaintiff made known his wish to the conductor (that is, his wish to get off the train); that the conductor, the agent of the railroad, told him to get off. That tends to show—I

Case Stated.

don't say it shows—negligence; but it is a question which must go to the jury, whether that was negligence of the company or not." The defendant then introduced its testimony, and after the charge of the circuit judge, which, it seems to us, was entirely correct, and eminently fair to both parties, the case was submitted to the jury, who returned a verdict in favor of the plaintiff for $600, and judgment was entered thereon. From this judgment the defendant gave notice of appeal, basing the same upon four exceptions; but as two of them—the second and third—were abandoned, and very properly abandoned, at the hearing, it is only necessary to state and consider the first and fourth exceptions.

The first exception imputes error to the circuit judge in refusing the motion for a nonsuit. This turns upon the question whether there was any evidence tending to show negligence on the part of the defendant company from which the injuries complained of resulted. While it is true that the evidence did not tend to show that the plaintiff was a passenger, and hence that the defendant company owed plaintiff no duty as such, yet it is equally true that the evidence did tend to show that plaintiff went to the train for the purpose of assisting his wife, who was incumbered with heavy baggage, to board the train as a passenger; that the wife needed assistance in boarding the train, and, none being offered or rendered by any of the railroad officials, it became necessary for the plaintiff, her husband, to render the assistance necessary; that for this purpose he took his wife's heavy valise, and went up the steps of the second-class car, for which his wife had a ticket; that as soon as he reached the platform he felt the train moving, and called to his wife to take the valise, so as to let him get off the train; that she took the valise, and the plaintiff went down the steps as quick as he could, saying to the conductor, who was standing on the front steps of the first-class car, that he wanted to get off, when the conductor told him to get off while the train was in motion; and that in doing so he fell or was thrown to the ground, whereby he sustained the injuries complained of. It is not, and cannot be, denied that such was the purport of the testimony on the part of the plaintiff, which was, of course, the only testimony before the court when the motion for a nonsuit was made. The question, then, is, did this testimony tend to show negligence on the part of the defendant. This depends upon the inquiry whether the defendant company owed the plaintiff any duty, and, if so, what, under the circumstances. There

can be no doubt that a female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble or incumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train; and, if the same is not afforded by the railroad officials or servants, her husband or other escort may render her the necessary assistance, and for this purpose is entitled to enter the train and is entitled to a reasonable time to leave the train before it is put in motion. Both reason and authority unite in sustaining this proposition, and indeed we do not understand that it is denied in this case, if accompanied with the proviso that the defendant or its agents have notice of the purpose for which such person enters the train. Accepting the proposition with this proviso, we think it clear that there was some testimony—whether sufficient or not is not the question under a motion for a nonsuit—tending to show that defendant neglected to perform its duty to the plaintiff, in not allowing him a reasonable time to leave the train, which he had started to enter for the purpose of assisting his wife; for the evidence on the part of the plaintiff tends to show that the conductor was standing on the front steps of the first-class car, near enough probably to hear the wife tell her husband to bring in her baggage, as she was going up the steps of the second-class car, and that plaintiff, as soon as he discovered that the train was in motion, informed the conductor that he wanted to get off, and was told by him to get off, although the train was then in motion. This testimony, if true,—and that was a question for the jury,—certainly tended to show negligence in the performance of the duty which defendant owed plaintiff under the circumstances stated.

Injury to Passenger's Escort—Alighting from Train—Negligence.

It is contended, however, for the appellant, that according to this testimony the conductor had no notice of plaintiff's wish to get off the train until after it had started. Even if this view of the testimony should be accepted, we do not think it would relieve the defendant from the charge of negligence; for the evidence was that the train, being behind time, stopped for a very short time,– about half a minute, as one of plaintiff's witnesses estimated,– and if the conductor had started his train after such a very short time, and was then notified that the plaintiff desired to get off the train, he could and should have stopped his train to enable this old man, 65 years of age, to get off the train, especially as the testimony tended to show that the train had not stopped long enough to allow the plain-

tiff time to get off before it started. Besides, if the conductor was standing near where the wife of the plaintiff got on the train,– and that was a question of fact for the jury,– the jury might have inferred from the testimony that he was near enough to see and hear what passed between plaintiff and his wife as she was getting on the train; and, if so, that was sufficient to give him notice that the plaintiff merely got on the platform of the second-class car to assist his wife with her baggage, and wanted to get off before the train started. We do not think, therefore, that there was any error in refusing the motion for a nonsuit.

The only other exception is the fourth, which reads as follows: "Because the presiding judge erred, as matter of law, in charging that 'a railroad company is liable for injuries to persons lawfully in its cars, caused by a certain jolting or jerking of the same, if such jolting or jerking was due to the negligence and carelessness of the defendant, its servants and agents, and the injured party was not contributorily negligent,' because it was not alleged in the complaint that the negligence of defendant was caused by any 'jolting or jerking,' and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant, and said charge was not applicable to the case at bar." It will be observed that the correctness of the legal proposition contained in the charge is not impugned, but the error is alleged to lie in the fact that there was no allegation in the complaint "that the negligence of defendant was caused by any jolting or jerking, and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant," and hence said charge was inapplicable to the case. In the seventh paragraph of the complaint there is a general allegation that the defendant "negligently and carelessly started the train"; and if the defendant desired any more specific allegation of negligence in starting the train,—as, for example, in starting the train with a jolt or jerk,—the defendant had a right to move the court to make the complaint more specific in its allegations, and, not having done so, it is too late now to avail itself of such an exception. As was well said by MR. JUSTICE GARY in delivering the opinion of the court in Spires v. Railroad Co., 47 S. C., at page 30, 24 S. E. 993: "When a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies to sustain his action, it is the duty

Same—Instruction.

of the defendant to make a motion to have the complaint made more definite and certain; and when this is not done the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the defendant." Accordingly in this case the plaintiff was allowed to testify, without objection, that, as he was about to get off, "the train either ran over a joint, or made a jerk, and I fell." So that the charge was applicable to the pleadings and the evidence. The other branch of the exception—that "there was no proof that such jerking or jolting was due to any negligence on the part of the defendant"—is fully disposed of by the terms of the charge, in which the circuit judge was careful to say "if such jolting or jerking was due to the negligence and carelessness of the defendants, its servants and agents"; so that, if there was no evidence of any negligence, the defendant could not possibly be injured by such a charge. Counsel for appellant, in his argument, has urged another objection to this charge, which is not indicated in the exception, and is not, therefore, properly before us. But, even if it were, it could not avail the defendant. It is contended that the vice in the charge was the failure of his honor to distinguish "between the case of a person in the car, in a position of safety, and the case of the plaintiff, who at the time of the alleged jerk was in a position of danger, on the bottom step of the car, and in the act of trying to get off a moving train,"—it should be added, getting off by the direction of the conductor, as the plaintiff testified. In the first place, it does not appear that any such distinction was brought to the attention of the circuit judge, either by request to charge or otherwise; and, in the second place, the matter was brought to the attention of the jury by the concluding words, "and the injured party was not contributorily negligent." The fourth exception is overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

CONE

v.

CENTRAL R. CO. OF NEW JERSEY.

(*Supreme Court of New Jersey, July 19, 1898.*)

Illegal Arrest of Passenger for Riding Beyond Destination—Damages.*—A passenger upon a railroad train who has been illegally arrested, by the agents of the company, for riding beyond the station to which he has paid his fare (the train upon which he was traveling not having stopped at that station), is entitled to compensation from the company for such physical injuries as he may have sustained, and for the injury to his feelings resulting from the indignity to which he has been subjected, but he is not entitled to recover punitive damages.

(Syllabus by the Court.)

ARGUED February term, 1898, before LIPPINCOTT, GUMMERE, and LUDLOW, JJ.

Allan L. McDermott, for plaintiff.
George Holmes, for defendant.

GUMMERE, J. Plaintiff, on the 12th day of April, 1897, purchased at the Communipaw Avenue Station of the defendant, in Jersey City, an excursion ticket to Elizabethport, to which place he went, and upon his return boarded a train of the defendant without first ascertaining, by inquiry or otherwise, if the train would stop at the Communipaw Avenue Station, where he desired to alight, and to which station he held a ticket. The train he boarded was an express train, and was not scheduled to stop at any station between Elizabethport and the terminal in Jersey City. He presented his ticket to the conductor on the train, who at the same time informed him that the train did not stop at Communipaw Avenue, and that he would have to pay an additional eight cents for carriage from the Communipaw Avenue Station to Jersey City. This the plaintiff refused to do, and, upon the arrival of the train in Jersey City, there was a further dispute

*See note at end of case.

as to whether the plaintiff was obliged to pay the eight cents or not, finally resulting in the plaintiff being arrested by a police officer at the instance of the conductor, and taken to a police station in Jersy City, where the conductor made a charge against him, and he was then paroled until 8 o'clock the next morning before the police judge. He duly appeared and the police judge refused to entertain the charge, stating that he did not see that the plaintiff had violated any law. On the trial of the case it was submitted to the jury under a charge that, if the defendant was liable, they might assess punitive damages against it, if the plaintiff's arrest was the result of malice on the part of either the conductor or the police officer; whereupon the jury returned a verdict of $5,000.

It is claimed by the plaintiff that the police officer used undue violence in making the arrest, but it is not suggested that any substantial injury was sustained by him. A reading of the evidence makes it clear that the largeness of the verdict was due to the instructions of the trial judge on the question of punitive damages. That instruction was erroneous. Bullock *v.* Railroad Co. (N. J. Err. & App.; March term, 1898), 40 Atl. 650. Assuming that the plaintiff's arrest was illegal, his damages should have been limited to a reasonable compensation for the physical injury sustained by him, and for the injury to his feelings resulting from the indignity to which he was subjected. Allen *v.* Ferry Co., 46 N. J. Law, 199. The rule to show cause should be made absolute.

NOTE.

Illegal Arrest of Passenger—Damages.—In Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 58 Am. & Eng. R. Cas. 436, Prentice, a passenger on the company's train, was traveling on an excursion ticket. During the journey, he purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that Prentice had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employee of the company, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out Prentice to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the passenger and rudely searched him for weapons in the presence of other passengers, hurried him into another car, and

there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife, who was traveling with him. The arrested passenger was further otherwise maltreated and humiliated, and the conductor, having accompanied him to the station house, and knowing that he had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which the prisoner gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged. It was held that in compensating the passenger the jury were authorized to go beyond his outlay in and about the suit and to consider the humiliation and outrage to which he had been subjected. MR. JUSTICE GRAY, delivering the opinion of the court said: "Independently of this [*i. e.*, exemplary damages], in the case of a corporation as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered." See also Fisher *v.* Metropolitan El. R. Co., 34 Hun (N. Y.) 433.

LUTZ *et ux.*

v.

LOUISVILLE RY. CO.

(*Court of Appeals of Kentucky, Jan. 11, 1890.*)

Passenger Alighting from Car—Duty of Carrier.*—It is the duty of a railroad company to observe the utmost care and skill which a prudent man would exercise under like circumstances, in the management and control of its car while a passenger is alighting therefrom, and to afford the passenger reasonable opportunity to alight in safety; and if a passenger is injured through the carrier's failure to perform such duties, or either of them, the passenger is entitled to recover.

Same—Personal Injuries—Allegation and Proof.—In an action for injuries alleged to have resulted from the failure of the carrier to perform such duties, plaintiff may recover upon proof that only a portion of such injuries was the result of the carrier's negligence.

*See Barth *v.* Kansas City El. Ry. Co. (Mo.), 10 Am. & Eng. R. Cas., N. S., 281, and *note*, p. 300.

Lutz *v.* Louisville Ry. Co

APPEAL by plaintiff from Jefferson county circuit court. *Reversed.*

R. C. Davis, *John J. Davis*, and *Matt O'Doherty*, for appellants.

Fairleigh & Straus, for appellee.

GUFFY, J. This action was instituted by the appellants, John Lutz and Minnie Lutz, against the appellee, to recover damages for injuries to the appellant Minnie, resulting from the negligence of the defendant. The material averments in the petition are, in substance: Case Stated. That the appellant Minnie was a passenger, being carried by the appellee on its train of cars, and that before reaching the intersection of Twenty-Eighth street and Courtney avenue, and when within such reasonable distance of said platform as would have enabled the defendant to stop said car at said platform, the appellant rang the bell as a signal for the car to stop in order that she might get off the car; but that defendant's agents and servants in charge of said train, instead of stopping the car upon which plaintiff was riding opposite the platform, where she could alight in safety, negligently and recklessly ran said car past said platform, and when plaintiff stepped to the rear of the car on which she was riding, for the purpose of alighting, defendant's agents and servants in charge of said car negligently, recklessly, and carelessly failed and refused to back said car up to the platform, where plaintiff could safely alight, although they saw and knew that she wanted to leave the said car. That, by the reason of the negligence aforesaid, plaintiff was forced and compelled to try and leave said car; and while she was in the act of so doing, and had started to step down to the ground, defendant's agents and servants in charge of said car negligently, recklessly, and carelessly started said car, and appellant was forced to alight and jump in order to save herself; and, by the reason of the negligent acts of the defendant's aforesaid, she was thrown down, and greatly injured, and made sick and sore; and, being pregnant at the time, miscarriage was brought on, which greatly impaired and injured her in health and strength, and she was confined to her house and greatly disabled for a long time, and was compelled to employ a physician and purchase medicine, at a great cost and expense,—the cost of medicine being $10, and physician's bill being $50; and was otherwise damaged in the sum of $10,000. The answer is a denial of all negli-

gence and all damages, and also pleads contributory negligence; all of which was denied by the reply. A jury trial resulted in a verdict for the defendant, and, appellants' motion for a new trial being overruled, this appeal is prosecuted.

The contention of appellee is that the evidence did not authorize, in any event, a recovery; that the instructions are correct, but, if not, the appellants were not prejudiced thereby, for the reason that no recovery was authorized by the testimony. The contention of the appellants is that the verdict is contrary to the evidence, and not supported thereby, and that the court erred in refusing the instructions offered by the plaintiffs, and also erred in giving the instructions given by the court on its own motion. The uncontradicted testimony of the appellant Mrs. Lutz showed negligence upon the part of appellee and some injury resulting therefrom. It may, however, be said that the evidence is conflicting as to whether the injury received caused the miscarriage complained of, and the suffering and expense incident to the miscarriage. Instruction No. 1, asked by appellants, reads as follows: "The court instructs the jury that the law made it the duty of the defendant's agents and servants operating the cars upon which it is alleged plaintiff was a passenger to observe the utmost care and skill which a prudent man would exercise, under like circumstances, in the management and control thereof, while she was alighting therefrom, and to afford her reasonable opportunity to alight in safety; and if the jury shall believe from the evidence that the defendant's said agents, or any of them, failed to observe such care, and that by reason of such failure plaintiff received the injuries by her alleged, then the law is for the plaintiff, and the jury should so find." This instruction is a correct statement of the law, and the same has been so often announced by this court that the citation of authorities is deemed unnecessary.

Passenger Alighting from Car—Duty of Carrier.

The instructions given by the court do not sufficiently define the duties which appellee owed to the appellant; and, besides, instruction No. 1, in effect, required the jury to believe that the negligence of appellee caused all the injuries to the plaintiff complained of in her petition, otherwise they should find for the defendant. If it is true that the negligence of the appellee caused some injury to the plaintiff in getting off the cars, or being thrown off, as alleged by her, she would be entitled to recover therefor, although

Same—Personal Injuries—Allegation and Proof.

in point of fact the injuries might not have caused the miscarriage complained of; but, under the instructions given by the court, the jury was, in substance, required to find for the defendant, unless the injuries to the plaintiff complained of were caused by the negligence of the appellee; and that, too, without defining what degree of care appellee was required to observe. For the reasons stated, the judgment is reversed, and cause remanded, with directions to set aside the verdict and judgment, and award appellants a new trial, and for proceedings consistent with this opinion.

CENTRAL OF GEORGIA RY. CO.

v.

PRICE.

(*Supreme Court of Georgia, Dec. 14, 1898.*)

Carrying Passenger beyond Destination—Injury to Passenger while at Hotel—Liability of Carrier.*—Where, through the negligence of the conductor of a railway company, a passenger on its cars has been carried beyond the point of her destination, such conductor, in the absence of express authority so to do, cannot constitute the proprietor of an hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination. It follows, therefore, that the company is not liable for any injuries or damage such passenger may have sustained while at the hotel, in consequence of any negligence on the part of its proprietor.

(Syllabus by the Court.)

ERROR by defendant from Macon county superior court. *Reversed.*

Wm. D. Kiddoo, for plaintiff in error.

M. Felton Hatcher and *Guerry & Hall*, for defendant in error.

SIMMONS, C. J. In the view we take of this case, it is unnecessary to deal with the many special grounds of the

*See Southern Ry. Co. *v.* Bryant (Ga.), *ante*, and *foot-note*.

motion for a new trial. The record discloses that Mrs. Price was a passenger on a train of the defendant company, and that her destination was Winchester, Ga. Through the negligence of the conductor, she was not put off at Winchester, but was carried on to Montezuma. Upon her arrival at the latter place, the conductor advised her to go to the hotel and spend the night, he agreeing to carry her back to Winchester in the morning when his train made the return trip. He accompanied her to an hotel, where a room was assigned her, the conductor agreeing with the proprietor to pay her expenses. She was taken to her room by the proprietor or his servants, and furnished with a kerosene lamp, which she left burning after she had retired to bed. Some time during the night, the lamp, she claims, exploded, and set fire to a mosquito net which covered the bed, and, in her efforts to extinguish the flames, her hands were badly burned. She sued the railway company for damages, and, under the charge of the court, the jury returned a verdict in her favor for $400. A motion for a new trial was made, and overruled by the trial judge. To this the company excepted.

The contention of the plaintiff in the court below was that when the conductor carried her to the hotel in Montezuma, and asked her to remain there until his return the next morning, he thereby made the proprietor of the hotel the agent of the railway company, and that, if the plaintiff was injured by the negligence of the proprietor or his servants in furnishing her a defective lamp, the railway company was liable, the contract of carriage not having been fully executed, and the plaintiff being still a passenger. The trial judge, in his charge, took this view of the law, and in substance so instructed the jury. We, however, think this was error. A conductor on a passenger train of a railway company is the agent of the company, and the company is bound by all of his acts within the scope of his employment. His business is to superintend the running of the train, look after the comfort and safety of the passengers, and do such other work, in and about the running of the train, as is imposed upon him by the rules of the company or by law. Being only an agent, he had no authority, without express power conferred by the company, to appoint a subagent. He could not delegate to another, an agent of his own appointment, the powers conferred upon him. Civ. Code, § 2999. It was not within the scope of his business to constitute the proprietor of an hotel

the agent of the company for the purpose of taking care of the plaintiff during the night. We are aware that several of the courts have held that, where a passenger is injured by the negligence of a railway company, such company is liable for the compensation of a surgeon employed by the conductor or station agent for attendance upon the injured passenger. These rulings are put upon the ground of humanity and public policy in cases of such emergency, but, so far as we can ascertain, no court has ever held that the company would be liable to the injured passenger for the negligence or malpractice of a surgeon so employed.

It is argued that, whether or not the proprietor of the hotel was the agent of the company, the contract of carriage was not completed, and it was the duty of the company, by its agents, safely to care for the passenger until they had delivered her at her destination. Admitting, for the sake of the argument, that this is true, we still think that the company would not be liable for the consequences of the landlord's negligence. The negligence of the company consisted in passing the station where the passenger desired to alight, without giving her an opportunity to get off. Taking her version of the manner in which she was injured, the injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp. The negligence of the company in passing her station was therfore not the natural and proximate cause of her injury. There was the interposition of a separate, independent agency,—the negligence of the proprietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control. Civ. Code, §§ 3912, 3913; Perry *v.* Railroad Co., 66 Ga. 746; Mayor, etc., *v.* Dykes (Ga.) 31 S. E. 443; Railway Co. *v.* Trich, 117 Pa. St. 390, 11 Atl. 627; Wood *v.* Railroad Co., 177 Pa. St. 306, 35 Atl. 699; Lewis *v.* Railway Co., 54 Mich. 55, 19 N. W. 744; Hoag *v.* Railroad Co., 85 Pa. St. 293; Sira *v.* Railroad Co., 115 Mo. 127, 21 S. W. 905; Railway Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, and 29 S. W. 652; Smith *v.* Bolles, 132 U. S. 125, 10 Sup. Ct. 39. The injuries to the plaintiff were not the natural and proximate consequences of carrying her beyond her station, but were unusual, and could not have been foreseen or provided against by the highest practicable care. The plaintiff was not entitled to recover for such injuries, and the court erred in overruling the motion for new trial. Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO.

v.

JOHNSTON.

(*Supreme Court of Georgia, Dec. 13, 1898.*)

Injury to Passenger—Admissions—Instructions.—In the trial of a suit against a railroad company for personal injuries, when counsel for the defendant has stated in his argument to the jury that he did not take the position that the plaintiff was not hurt at all, and when the evidence in the case demands a finding, on this particular issue, that he was hurt, it was not error in the court to charge the jury that it was admitted by the defendant that the plaintiff was injured as the result of the accident.

Due Care—Definition of.*—It is not, in the trial of an action by a passenger against a railroad company for personal injuries sustained while travelling on its cars, an error of which the defendant can complain, for the court to define the degree of care and diligence which such a company should exercise as "an extra high degree of care," though in defining "extraordinary diligence" it is better practice for the trial judge to confine himself to the definition as given in the Code.

"Negligent"—Synonyms.—Where one of the theories of the plaintiff, upon which he relied for a recovery, was that the railroad company was guilty of negligence in running its cars over the switch where the injury occurred at an unusual and dangerous rate of speed, and the court charged that if the company ran upon the switch at an excessive or improper rate of speed, and thereby contributed to and caused the accident, then the defendant would be liable, the words "excessive or improper" might be treated as the equivalent of the word "negligent"; but it would be decidedly better for the court to use the latter word, when charging in such a connection.

Damages—Instructions.†—When, in such a trial, there was evidence clearly tending to show that the plaintiff's earning capacity had not been totally destroyed, it was improper for the court, especially at the close of its charge, to use the language: "The measure of

*As to Care Required of Carriers of Passengers, see *notes*, 9 Am. & Eng. R. Cas., N. S., 652, *et seq.*

†See note at end of case.

damages in this case; that is, should you find that the plaintiff is entitled to recover, under the rules of law that I have given you in charge, and the opinion you entertain of the testimony, then you will find what his earnings will or would be for the length of time he is expected to live; then you would reduce it to its present value." An error of this kind is, though the court had previously laid down the correct rule on this subject, cause for a new trial when, taking into view the large amount of the verdict rendered, it cannot be safely and fairly said that the jury were not misled by the erroneous instruction given at the conclusion of the charge.

(Syllabus by the Court.)

ERROR by defendant from Taylor county superior court. *Reversed.*

Lawton & Cunningham, *John D. Little*, *W. S. Wallace*, *C. J. Thornton*, and *O. M. Colbert*, for plaintiff in error.

Hoke Smith, *H. C. Peeples*, *W. E. Steed*, and *Albert A. Carson*, for defendant in error.

LEWIS, J. 1. It appears from the record in this case that the general counsel for the plaintiff in error, in his argument on the trial before the jury, stated that he did not take the position that plaintiff was not hurt at all. Error is assigned on a statement made by the judge in his charge to the jury that it was admitted by the defendant that the plaintiff was injured as the result of the accident. Conceding that this charge was based entirely upon the above statement of counsel, we do not think an unfair construction was given this language. Although such an issue was presented by the pleadings in the case, the defendant alleging in its plea that the plaintiff had received no injury whatever as the result of the accident, yet the court and jury might very reasonably have inferred from the above statement of counsel that it was no longer contended that plaintiff received no injury whatever, and that the contention in the pleadings on this point had been abandoned. But, apart from this, after a careful review of the entire testimony in the record, the proof was so positive, direct, and overwhelming that the plaintiff was hurt in consequence of the derailment of the train, that a finding of this issue was demanded by the evidence. If this be true, even if the court erred in concluding that a formal admission had been made as he charged, it was a harmless error, and is not, therefore, ground for granting a new

Injury to Passenger—Admissions—Instructions.

trial. On this particular point, with reference to the injuries received by the plaintiff, considered in the light of all the testimony on the subject, the real contest between the litigants seems to have been in reference to the extent of the plaintiff's injury,—the one side contending that he was seriously and permanently injured; and the other, that his injuries were only of a slight and temporary nature. In the case of McCurdy *v.* Binion, 80 Ga. 691, 6 S. E. 275, it was held not to be error for the judge to state certain facts as *data* which might be used by the jury in reaching their verdict; it having been proved in the case that the facts were admitted by the defendant, and were not in contest. To the same affect, see Chambers *v.* Walker, 80 Ga. 643 (Syl. point 3), 6 S. E. 165; Crusselle *v.* Pugh, 67 Ga. 430 (Syl. point 2). The inference is unavoidable in this case that the charge of the court complained of, even if erroneous, did not effect the finding of the jury. Judging from the amount of their verdict, they must have reached the conclusion that the plaintiff was hurt to the full extent he claimed, and that his injuries were of a serious and permanent nature. They were certainly not constrained to reach this conclusion from the statement of the court that it was conceded that the plaintiff was hurt as the result of the accident; for the judge, in other portions of his charge, fully and fairly covered the contentions and issues between the parties with reference to the extent of plaintiff's injuries. This disposes of the eight, ninth, tenth, and eleventh grounds of the motion for a new trial.

2. Complaint is made in the twelfth ground of the motion of the charge of the court, which, in effect, defined the diligence required of the railroad company to be "an extra high degree of care." The plaintiff being a passenger upon the defendant company's car when he was injured, the duty it owed to him, under section 2266 of the Civil Code, was extraordinary diligence. Section 2899 defines that diligence to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." In charging upon this subject, the proper and safer method for the judge to adopt would be to confine himself to the statute. Its definition cannot well be simplified or made clearer by an attempt to use synonymous terms, or to convey its meaning in other words. But the definition given by the court, even if erroneous, is not such an error as the defendant can complain of. If there was any error in it, it was in favor of the

Due Care—Definition of.

company, and not the plaintiff, for the words used by the judge do not indicate in such forcible language the degree of care required as do the words in the statute. That extreme care and caution which very prudent and thoughtful persons use would naturally impress one as meaning something more than an extra high degree of care. Many courts of last resorts in other states of the Union have defined the diligence required by carriers of passengers to be the "highest degree of care," and some have gone possibly to a greater extent, by defining the rule to mean: "Every precaution which human skill, care, and foresight can provide." Caldwell *v.* Steamboat Co., 47 N. Y. 282. "The utmost care and diligence in providing against those injuries which can be avoided by human foresight." Dodge *v.* Steamboat Co., 148 Mass. 219, 19 N. E. 373. "The utmost care and diligence of very cautious persons." Taylor *v.* Railway Co., 48 N. H. 304. "The greatest possible care and diligence." Railroad Co. *v.* Noell's Adm'r, 32 Va. 399. But, as our statute specifically defines what is meant by "extraordinary diligence," neither the adjudications of other courts on the subject, nor the definition in standard dictionaries, need be invoked to throw light upon the subject. No request having been made to the court to give in charge this statutory definition, the defendant company cannot complain of a construction of the law which, to say the least of it, does not impose upon the railroad a greater degree of diligence than that required by law. This disposes of the twelfth and thirteenth grounds of the motion.

3 In the argument for plaintiff in error it was especially contended that the charge complained of in the fourteenth and fifteenth grounds of the motion, to the effect that if defendant ran upon the switch at an excessive or improper rate of speed, and thereby contributed to and caused the accident, then it would be liable to the plaintiff, was error, because the question of negligence was one solely for the jury, and that, even if the speed of the train was excessive or improper, it was still for the jury to say whether, under all the circumstances of this particular case, such a rate of speed constituted negligence. It is unquestionably true that questions of negligence are for the jury, and the court cannot instruct them that particular acts amount to negligence. But this the judge did not undertake to do in his charge. The term "excessive" means tending to, or marked by, excess, which is defined by

Negligent—Synonyms.

Webster to be "the quality or state of exceeding the proper or reasonable limit or measure." In the case of Chadbourne *v.* Town of Newcastle, 48 N. H. 196, the term "improper," when applied to human conduct, is defined to be "such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of." It would have been manifest error if the judge had charged the jury what particular rate of speed would have been excessive or improper; but, if a person is guilty of excessive or improper conduct which results in injury to another, it necessarily follows that the injury is occasioned by the negligence of the wrongdoer. For the judge, therefore, to charge the jury in the words used by him, was nothing more or less than telling them, in effect, that, if the plaintiff's injuries were caused by the negligent conduct of the defendant in the rate of speed at which it was running its car, the defendant would be liable. The question as to whether the speed actually used was improper or negligent was left entirely to the jury. We think, therefore, that the words "excessive or improper," in the connection in which they were used by the court in his charge, might fairly and properly be considered as equivalent to the word "negligent," and that there was no error in overruling the motion for a new trial on this ground. It would, however, have been decidedly better for the court to have used the word "negligent" itself in lieu of the above language employed by him, as this would not have left the legality of the charge, or its true intent and meaning, open to criticism or doubt.

4. It clearly appears from the record in the case that the earning capacity of the defendant in error was not totally destroyed by the injuries he received. He himself admitted upon the stand that he had pursued the practice of his profession to some extent after receiving these injuries, and had made some money in his business; specifying the amount. Indeed, it was not contended by his counsel that there was any testimony in the record from which it could be inferred that the ability of the defendant in error to pursue his regular occupation to some extent, and to earn money in such pursuit, had been entirely destroyed. In the charge of the court complained of, the jury were, in effect, instructed that they could take as a basis of a recovery for any financial loss which the plaintiff below may have sustained what his earnings will or would be for the length of time he is expected to live, and, after ascertaining

Damages—Instructions.

such amount, they should then reduce it to its present value. It was manifest error, inasmuch as the language used gave the jury the latitude of basing their finding of damages upon the entire earnings ot the plaintiff, instead of upon the difference between what his earnings would be after the injury and what they would have been had he not been hurt. It was contended, however, by counsel for defendant in error, that in other portions of the charge the court fairly and fully instructed the jury on this subject, and that, considering the charge complained of in connection with the entire charge upon this subject, the jury could not have been misled by the instructions given them. It is true, as contended, that the judge did, in another portion of his charge, correctly state the law on this particular point. The charge complained of, however, was not given in the same connection. After instructing the jury fully upon the measure of damages, the court proceeded to give them at considerable length the rules of law in regard to pleadings, degree of diligence railroad companies should exercise in such cases, rules of evidence, and other matters not directly connected with the subject relating to the measure of damages in this particular case. The judge then, at the conclusion of his charge, again adverted to this subject relating to the measure of damages: instructing the jury that they should find what the plaintiff's earnings will or would be for the length of time that he was expected to live, and to reduce that amount to its present value. We think the language used was calculated to leave upon the minds of the jury an erroneous impression as to what rules should govern them in reference to this very important issue on trial; and coming, as it did, at the conclusion of the charge, and being the last impression received from the court, it might have supplanted the correct ideas the jury may have at first entertained from previous portions of the court's language. This court has repeatedly held that, where an erroneous rule of law is given to the jury on a material issue in a case, a new trial will be granted, notwithstanding the correct rule may have been announced in other portions of the charge. Railroad Co. *v.* Hicks, 95 Ga, 301, 22 S. E. 613; Powell *v.* State, 101 Ga. 11, 29 S. E. 309 (Syl. point 6); Railway Co. *v.* Davis (Ga.) 30 S. E. 262. It does not follow, however, that because one portion of the charge is totally repugnant to another, even on a material point, such a mistake on the part of the court will necessarily be reversible error. If, for instance, the verdict rendered by

Note

the jury was demanded by the evidence, a new trial will not ordinarily be granted, regardless of errors of law committed. Or if the verdict was for such an amount as to clearly indicate upon its face that the jury must have applied the correct rule laid down by the court, and not the erroneous rule, it would be at once concluded that the error worked no harm to the plaintiff in error. The real question seems to be whether or not, on account of such conflicts or inconsistencies in the instructions of the court upon vital issues in a case, it can with perfect safety and fairness be said that the jury were not misled to the injury of the complaining party. Applying this doctrine to the case at bar, we think there was error in overruling this ground of the motion for a new trial. The verdict found by the jury was certainly not demanded by the evidence, nor was there anything in the amount of the finding to indicate, or to authorize the inference, that they did not apply the erroneous instead of the correct rule on the subject of the financial damages which the defendant in error has sustained; for, if the last rule on this subject laid down by the court had been adopted by the jury, the most favorable view of the evidence that could be taken indicates that they nevertheless found, in addition to such damages, several thousand dollars for pain and suffering. We do not mean to intimate that the verdict in this case was contrary to evidence, or that it was so excessive as to authorize this court to infer bias and prejudice in the minds of the jury either against the plaintiff in error or for the defendant in error. As the case goes back for a new trial, we refrain from expressing any opinion whatever on this subject. The judgment of the court below is reversed solely on the ground indicated in the fourth headnote. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., and LITTLE, J., absent on account of sickness.

NOTE.

Damages—Loss of Earning Capacity.—To recover damages for loss of earning capacity, evidence of the earnings of the plaintiff before and after the injury is admissible for the purpose of comparison. Illinois Cent. R. Co. *v.* Davidson, 76 Fed. Rep. 517; Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305; Linton Coal, etc., Co. *v.* Persons, 15 Ind. App. 69; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41; Nash *v.* Sharpe, 19 Hun (N. Y.) 365; Texas, etc., R. Co. *v.* Davidson, 3 Tex.

Civ. App. 542; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42; Campbell *v.* Fisher, (Tex. Civ. App. 1893) 24 S. W. Rep. 661; Bagley *v.* Mason, 69 Vt. 175.

The measure of damages in such cases is the difference between the earning capacity of the injured party before and after the injury as indicated, not by what has been actually earned since the injuries were received, but by that which the plaintiff might have earned or is capable of earning. Gulf, etc., R. Co. *v.* Abbott, (Tex. Civ. App. 1893) 24 S. W. Rep. 299. And see Winter *v.* Central Iowa R. Co., 80 Iowa 443; Campbell *v.* Fisher, (Tex. Civ. App. 1893) 24 S. W. Rep. 661.

The measure of damages is fixed with reference to the difference between the plaintiff's earning capacity before and after the injury complained of. Gulf, etc., R. Co. *v.* Abbott, (Tex. Civ. App. 1893) 24 S. W. Rep. 299; Campbell *v.* Fisher, (Tex. Civ. App. 1893) 24 S. W. Rep. 661.

CLARK'S ADM'X

v.

LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, Jan. 21, 1899.*)

Injury to Passenger—Pleading and Proof.*—In an action against a railroad company for injuries to plaintiff, resulting from the explosion of gasoline in the coach where plaintiff was at the time, it was alleged that plaintiff was defendant's passenger; and that the gasoline was in the coach by permission of defendant. *Held*, that the allegation that plaintiff was a passenger for hire having been denied, it was essential that it should be proved.

APPEAL by plaintiff from Mason county circuit court. *Affirmed.*

A. E. Cole & Son, for appellant.
W. H. Wadsworth, for appellee.

DU RELLE, J. This suit was originally brought by appellant's intestate. Pending the litigation, he died, and the

*See Iseman *v.* South Carolina & G. R. Co. (S. Car., 1898), 11 Am. & Eng. R. Cas., N. S., 219, and *note*, 227 *et seq.*

action was revived in the name of his administratrix. The petition alleges, in substance, that the appellee was a common carrier of passengers for hire, and received appellant as a passenger, to be carried from Maysville to Cynthiana for hire, but negligently permitted gasoline or some other inflammable substance to be carried in the same coach with appellant, and to become ignited and explode, by reason whereof he was greatly and permanently injured. By amendment it was averred that the appellee carelessly and negligently suffered gasoline or some other combustible compound to be carried in the same passenger coach with appellant's intestate, and knowingly suffered it to be carried "in an unlawful quantity, of ——— gallons, without plainly and legibly marking on the vessel containing same, or causing to be marked on same, the words 'Explosive, Dangerous,' contrary to the statute in such cases made and provided," and negligently suffered it to become ignited and explode, by reason whereof appellant's intestate was injured. After the evidence was introduced, the court, on motion, directed the jury to find a verdict for appellee, and, as we think, properly. It is unnecessary, however, to consider the grounds on which we think the trial court's action justified, or to discuss the evidence further than to say that the essential averment that appellant was a passenger for hire was denied by the answer, and we find no evidence in the record to support the averment. To make out plaintiff's case, it was essential that this should be averred, and proved, if denied. As said in the case of Railroad Co. *v.* Hinds, 53 Pa. St. 512: "The only ground on which they [the railroad companies] can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action. It can rest on no other." Under the circumstances shown by the evidence in this case, the carrier was not responsible for the injury caused by the improper act of a passenger, unless there was a contract relation between the carrier and the injured person. Judgment affirmed.

BEECHER

v.

LONG ISLAND R. CO.

(*Supreme Court of New York, Appellate Division, Dec. 6, 1898.*)

Crossing Track to Board Train—Contributory Negligence—Question for Jury.*—Deceased and many other persons were in the station waiting room when the station master announced the approach of the train, and they left the room to board the train as quickly as possible, it being a very cold morning; deceased, while crossing the north track to take the train where he had always taken it at such times, was struck by it, and several of the persons with him barely escaped injury therefrom. Deceased knew that it was, and had been for years, the uniform custom of defendant not to run trains on the north track at that time of day. *Held*, that whether deceased was guilty of contributory negligence in attempting to cross the north track without looking and listening, was a question for the jury.

APPEAL by plaintiff from Queens county trial term. *Reversed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

Augustus N. Weller, for appellant.
William J. Kelly, for respondent.

HATCH, J. This case, upon its facts, presents the single question whether the deceased, in the exercise of reasonable care, was bound to take some measure of precaution, by looking and listening, before he attempted to cross the track upon the walk which carried him to the platform where he usually took the train that ran him down, or whether he might rely upon an assurance of safety, by reason of the conditions which the defendant had created, and which had uniformly been acted upon prior to the accident. The evidence warranted the jury in drawing an inference that the

*See note at end of case.

defendant was guilty of negligence in operating the train over the track where the deceased was injured. His contributory negligence, therefore, is the only question. Upon the evidence the jury were authorized to find that the usual place where the deceased took this train—indeed, there is no evidence that he ever took it at any other place—was from the south platform, upon the south track. The testimony of the switchman authorized the jury to find that this train had been run in upon this south track for a period of 12 or 13 years. During this time, he says, he had never known it to run upon the north track, except upon the morning of the accident. One passenger thought it had come in once or twice upon the north track in about two months before the accident. An examination of the testimony of this witness shows that his recollection upon this subject is quite vague. There is nothing to indicate that the deceased had ever taken it from the north track. As I view the case, therefore, the jury were authorized to find that it was the uniform custom for the defendant, in the operation of this train, to run it on the south track, by the side of the south platform, and that the passengers came from the station upon the north side, crossed the north track in a space planked by the defendant for the purpose of furnishing a walk, and so reached the south platform and boarded the train. There is no claim that any other train was run upon the north track, or upon any other track, at the time when this train was switched in, and when it left the depot. It is stated that many trains run upon all these tracks during the day, but it is not stated, nor was it claimed, that any other train ran into this station at the time when the Brooklyn train came in and left the station. We are to consider this case, therefore, as presenting this condition: The uniform custom, established for many years, in the running of this train, was for the train to switch in upon the south track. The station master announced its approach to the passengers in the station. The passengers came therefrom, crossed the station platform about 14 feet, then over the plank walk across the north track, and took the train. This was the uniform custom, except possibly once or twice, when this train ran in upon the north track. At other times no train had run there at this hour. Under these circumstances, was the deceased justified in acting upon the assumption that it was safe for him to travel over this space without looking and listening for trains thereon? I think the jury might say that he was, and that

it cannot be affirmed, as matter of law, that he was guilty of contributory negligence in so acting. The care which a person is called upon to exercise is always relative, having regard to the danger to be encountered, and the circumstances by which the person is surrounded. What should be the act of a person exercising reasonable care under given circumstances is the test, and is usually a question of fact. What a great many persons do under the same circumstances is fairly for the jury to consider in characterizing the act. Upon this morning, when this accident happened, it was not yet light, and was very cold. The passengers were assembled in the waiting room to take this train, which was two or three minutes late. The station master opened the station door, and announced the train. The notice was the usual notice. There was no warning that the train was upon the north track, which the passengers uniformly crossed. The deceased left the station in the lead, and it is evident that the natural impulse was, as contact with the cold was had, to seek shelter in the car as quickly as possible. The deceased passed over the usual way. The other passengers followed at his heels. He reached about the center of the track, and was struck. Another passenger, following, barely escaped, and others were close when the train interposed. It is true that some saw the train, but it is also clear that some would have walked over the same space that the deceased did, had not the train interposed. If a number of persons, possessed of the same information which the deceased had of the surroundings, acted in a manner similar to his act, under the same circumstances, it would seem to authorize an inference of the exercise of prudence and care commensurate with the supposed surroundings, upon which the deceased had the right to rely. What was there to induce a belief that the train was upon the north track? It had rarely, if ever, been there before. The defendant gave no notice of any change. It had created the custom which lulled the deceased and the other passengers into a sense of security, and it also created the condition which ran this train over the track, when it knew the passengers were in the habit of crossing with a sense of security. Having created both conditions, the defendant cannot in reason ask for the enforcement of any very strict act of circumspection on the part of the persons it invited into this environment.

It is said that the headlight was lit, that the bell was rung, and the train made a noise. The evidence may satisfy the

claim, or the reverse. One passenger said the headlight burned brightly, but he could not recollect that the bell rung. The other did not recollect that the lamp was lighted, but did recollect that the bell rung. Suppose either or both or all these conditions existed; were they calculated to arrest the attention of the deceased, and ought he to have seen them, or looked for them? If the train had run in upon its usual track, it would make a noise, the bell could be heard, and the light seen. These tracks were in close proximity, and all of the usual appliances for warning of the approach of the train would be as full and complete upon the one track as the other. It is not to be assumed that the train was always at the platform, at rest, when the passengers left the station to reach it. On the contrary, it is fair to assume that the train was announced while running into the station, and that it was, or might well be, in motion when the passengers left the station. There would be as much noise then as there was at the time in question, and it would come from practically the same direction, and be of the same character. It would seem that a jury would be authorized to say that there was nothing in all these surroundings, assuming them all to have existed, which would tend to arrest the attention of a passenger by reason of the train being upon the north, rather than upon the south track. I am unable to see any difference in principle between a case where a train upon another track is run through passengers crossing the track to take a train, and the circumstances surrounding this case. In both there is the invitation to act in a certain manner, and follow a usual course, for the purpose of transportation; and in both the danger was from an unexpected source, easily discoverable by the use of the faculties of hearing and seeing, but whose existence, I think, neither had reason to expect. In the former case, while the intending passenger must exercise reasonable care, yet, where the conditions are of the defendant's creation, it authorizes the assumption that it will not expose the passenger to unnecessary danger; and this assumption may be considered as naturally tending to diminish care and watchfulness, and thus furnish a case where the jury alone are qualified to characterize the act. Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* Railroad Co., 84 N. Y. 241. In the present case it would seem that the same reasons exist for the application of the same rule. "In general, it may be imprudent to enter upon a track while a locomotive is approaching. Whether it is so in a particular case must de-

pend upon the circumstances under which the attempt to cross is made. And where, though in fact it may be hazardous, a traveler does so in consequence of the acts of the defendant, he cannot be charged with negligence, unless the risk or danger was apparent." Palmer *v.* Railroad Co., 112 N. Y. 234, 244, 19 N. E. 681. "The question is whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury." Parsons *v.* Railroad Co., 113 N. Y. 355, 364, 21 N. E. 147. "The rule which requires a traveler on a highway which crosses a railroad to look and listen for approaching trains is not applicable to persons who are crossing a track on a walk of the railroad at a station for the purpose of going to the station to become passengers." Warfield *v.* Railroad Co., 8 App. Div. 479, 40 N. Y. Supp. 783. Within these authorities, I think that this case presented a question of fact for the jury, and that it was error to dismiss the complaint.

Much stress is laid upon the fact that it was conceded that the passengers who looked could determine that the train was approaching upon the north track. Why this concession should have been made by the plaintiff is one of the incomprehensible things in this case. It does not need much consideration of the circumstances, the relation of the tracks to each other, and the impaired light, to see that it may have been quite difficult to so determine, until the train was very close. One witness testified that he could tell, and another testified that he could not. Then followed the admission. Giving to this admission the full force claimed for it, I do not think it changes the question. If the deceased was lulled into a sense of security by the custom which the defendant had established,—and I think the evidence would authorize such a finding,—then I think he might assume that the defendant would not change the condition, and run a train over him. In the absence of notice of the change, I think he might rely upon a continuance of the custom, and that the defendant could make no departure therefrom without notice, except at its peril. Whether the deceased exercised reasonable care became a question for the jury.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur, except GOODRICH, P. J., and CULLEN, J., dissenting.

CULLEN, J. (dissenting). The plaintiff's testator was struck by a train in front of the defendant's station at Jamaica, and received injuries from which he died the following day. At this place there are a number of tracks, the lines from Long Island City and Brooklyn meeting here. It is sufficient to say, in relation to the situation of the tracks and the crossings, and the movements of trains at this station, that the two northerly tracks were used for west-bound trains. The more northerly of the two, and the one immediately in front of the station building, which was situated to the north of all the tracks, was used for trains destined for Long Island City, while the other was generally used for trains going to Brooklyn. These two tracks were separated from the other tracks by a fence. Between the first and the second track from the station building, or Brooklyn track, was a platform, used by passengers alighting from or entering the trains. In January, 1897, about 6 o'clock in the morning, the deceased was in the waiting room of the station, intending to take the 6:04 Rapid-Transit train to Brooklyn. On the approach of the train, the doorman of the station announced its appearance, and the passengers proceeded to the platform. The deceased stepped down from the platform onto the near track, when he was struck by the engine, and received the injuries already detailed. The train came to a stop about 50 feet from the point where the deceased was struck. Two eyewitnesses of the occurrence were produced on the trial. One of these testified that the headlight was burning brightly, but could not remember about the ringing of the bell. The other had no recollection of the headlight, but testified that he heard the bell rung. The morning (or night, rather) was clear and cold. There was no other train at the station. Both of these witnesses, on coming out of the station building, saw the train approaching. One of them testified that, without turning his head, but looking in front of him, his natural line of vision would extend 120 feet up the track. The other said 50 feet, while, if the head was turned in that direction, an unobstructed view of over 600 feet could be obtained. While one of the witnesses was being examined as to the approach of the train, the plaintiff's counsel made this admission: "We will admit it was on the north track, and that these men, when they saw it, could tell it was on the north track." It appeared that usually this train came in on the southerly of these two tracks, it having within the previous couple of months come in on the northerly or near track only

once or twice. The occasion of its position on this morning was the mistake or error of a switchman further up the line. The engine that drew the train was running backward; that is to say, the tank in front of the engine, though on the tank there was a headlight. On this proof the trial court dismissed the complaint on the ground of the contributory negligence of the plaintiff's testator. We think the disposition of the trial court was correct. It is undoubtedly true that the deceased was entitled to a reasonably safe passage from the waiting room to the train which he intended to take; and it is also true that the rule which requires travelers on the highway, before crossing a railroad track, to look and listen for the approach of a train, does not apply to a passenger proceeding in a railroad station to enter upon or alight from a train. Terry *v.* Jewett, 78 N. Y.338; Brassell *v.* Railroad Co., 84 N. Y. 241; Parsons *v.* Railroad Co., 113 N. Y. 355, 21 N. E. 145. It would be gross negligence to run a train across the line of movement of a throng of passengers to or from another train already at rest in a station, and a passenger is not required to contemplate such an occurrence, or be on his guard against it. But the circumstances of the present action or entirely different from those suggested. A passenger, on seeking to board a train, or moving through a station, is bound to use reasonable care and diligence for his own protection. He must use his senses to discover the situation that is presented to him; to see where his train is, and what is the proper or natural way of going to it. Except at the terminus of a road, or at great stations in large cities, it is the common custom for passengers to await on the platform the approach of the train some appreciable time before the train has actually stopped. When the deceased left the waiting room and came out onto the platform, certainly he must or should have seen that the train had not yet reached a stop, and was not yet presented to him for entrance. His hearing must also have told him of the movement of the train. The train came to a full stop about 50 feet from the place where the plaintiff's testator was struck. It is plain, therefore, that at the time he was struck the train must have been moving very slowly, and that when he stepped from the platform onto the near track the engine could not have been many feet away. No other trains were present, and there was nothing in the surroundings to distract the attention of the deceased. The notice that he received from the doorkeeper was a warning of the

approach of the train. That the deceased should have heard and seen the train coming is clear, and he undoubtedly knew of its approach. The admission of the plaintiff, already recited, is to the effect that, if the deceased had looked at the approaching train, he would have discovered that it was on the near or first track. The probability is that the deceased, being familiar with the general custom that the Rapid-Transit train would take the second track, relied on this assumption, and neglected to observe on which track the train was moving. The only question, then, presented in this case, is whether reliance on this custom excused the deceased from taking any pains to observe the movement of the train. We think not. That the custom was not an invariable one was proved by the testimony of plaintiff's witnesses. Either track was properly adapted for the use of the train, and, except for the previous custom, there was nothing to suggest to the passenger that the train would be presented for entrance on one track rather than on the other. It is the common custom in this country, on a double-track railroad, for trains to proceed on the right-hand track, but trains are at times moved in a reverse direction. The possibility that trains may move on a track in either direction is one that must always be contemplated by a person getting upon the track, except when the circumstances are such that he has the right to believe that no train would be moved thereon at all, as in the case already suggested, of his crossing tracks to reach a train at rest. In our opinion, the least care on the part of the deceased would have warned him of his danger, and enabled him to avoid it. The failure to take this care was, as a matter of law, negligence which should prevent a recovery.

The judgment appealed from should be affirmed, with costs.

GOODRICH, P, J., concurs.

NOTE.

Crossing Track in Passing between Station and Train.—The doctrine has been declared by a number of decisions, that a passenger crossing a track in passing from the depot to the train or in the opposite direction is not held to the exercise of the same degree of care and vigilance which is ordinarily exacted from other persons in crossing a railroad track, since he has a right to assume that the

railroad company will discharge its duty in providing a safe passageway to and from the train. Warner *v.* Railroad Co., 168 U. S. 339; Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368; Pennsylvania Co. *v.* Keane, 41 Ill. App. 317; Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800; Philadelphia, etc., R. Co. *v.* Anderson, 72 Md. 519, 20 Am. St. Rep. 483; Jewett *v.* Klein, 27 N. J. Eq. 550; Gonzales *v.* New York, etc., R. Co., 39 How Pr. (N. Y. Ct. App.) 407; Brassell *v.* New York Cent., etc., R. Co., 84 N. Y. 241; Terry *v.* Jewett, 78 N. Y. 338; Pennsylvania R. Co. *v.* White, 88 Pa. St. 327.

Accordingly, it has been held that it is not contributory negligence for a passenger in passing from the depot to the train, or *vice versa*, to attempt to cross an intermediate track without first looking and listening for the purpose of ascertaining whether a train is approaching or not, but the question is ordinarily one for the jury to decide under all the facts and circumstances of the case. Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368; Pennsylvania Co. *v.* Keane, 41 Ill. App. 317; Philadelphia, etc., R. Co. *v.* Anderson, 72 Md. 519, 20 Am. St. Rep. 483; Gonzales *v.* New York, etc., R. Co., 39 How. Pr. (N. Y. Ct. App.) 407; Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* New York Cent., etc., R. Co., 84 N. Y. 241; Pennsylvania R. Co. *v.* White, 88 Pa. St. 327. See also Brown *v.* Great Western R. Co., 52 L. T. N. S. 622.

In *Massachusetts* the doctrine has been laid down that if a passenger, passing from a station-house in the direct and usual course to enter the cars which are waiting to receive passengers, is obliged by the location of the tracks to pass over a track that is unoccupied, he has a right to rely to some extent upon proper and usual signals of warning to be given by trains or cars passing the unoccupied track at such a place, and under such circumstances, and the fact that a passenger who is attempting to cross a railroad track does not, at the instant of stepping on it, look to ascertain whether a train is approaching, is not conclusive of want of due care on his part. Chaffee *v.* Boston, etc., R. Corp., 104 Mass. 108. In this case it appeared that the passenger, while walking from the door of the passenger-room to the place where he stepped from the platform, looked up and down the track to see if it was clear, and saw nothing; that the night was dark, and immediately after stepping from the platform upon the track he was struck and injured by a passing hand-car which had no light upon it. The court said: "There is evidence in this that the plaintiff, in the act of crossing, was thoughtful of the danger to which he was exposed and was in the exercise of some degree of care with reference to it. Whether it was due care, under all the circumstances, applying as the measure of due care the rule that it must be such care as men of common prudence

Note

usually exercise in positions of like exposure and danger, was a question for the jury. It cannot be maintained, as matter of law, that the plaintiff was negligent in not looking up and down the track at the moment when, in a dark night, he stepped from the platform upon it."

But in the following case it was held that the facts were such as to justify the court in directing a verdict for the defendant without submitting the question of the plaintiff's negligence to the jury: In an action against a railroad for personal injuries it appeared in evidence that at the place of injury, a station, there were two tracks. The plaintiff, having been traveling from Boston on the westerly and outward track, alighted on the easterly side, between the two tracks, and started to cross the easterly track, when he was run down by an incoming train. On the side toward which the plaintiff was going were the station and a flight of steps leading in the direction of the plaintiff's home. On the westerly side was a long platform opposite the station, extending to the highway. The gates at the end of the plaintiff's car were open on both sides. The plaintiff knew the premises, and walked back through the train to this car to cross the track, as others were in the habit of doing. He testified that, as he was going down the steps he looked around and did not see anything; but it appeared that if he had looked before going upon the eastern track he could not have failed to see the approaching train in time to avoid danger. It was six in the evening, and the night was dark and misty, but there was a lighted headlight on the incoming engine. There was a rule of the road that a train should not pass another which was discharging passengers at a station, and the plaintiff knew that trains were not accustomed to pass. It was not shown that the plaintiff knew of the rule, and it did not seem to be material except as bearing upon the defendant's negligence, which was admitted. It was held that the judge rightfully directed a verdict for the defendant. Connolly *v.* New York, etc., R. Co., 158 Mass. 8. *Compare* Mayo *v.* Boston, etc., R. Co., 104 Mass. 137.

WEISS

v.

BETHLEHEM IRON CO.

(*Circuit Court of Appeals, Third Circuit, June 13, 1898.*)

Instructions.—In an action by an employee for injuries sustained while crossing the master's private railroad, it was error to charge that plaintiff's testimony in support of a very material proposition was uncorroborated, there being evidence tending to corroborate it; and such error was not cured by a subsequent remark from which the jury may have understood that no retraction was intended.

Same.—Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous.

Same.—If an instruction fails to present with sufficient distinction a material fact which may have a controlling effect, there is ground for refusal.

Same.—It is error for the court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case.

Injury to Employee Crossing Master's Private Railroad—Due Care.*—The "stop, look, and listen" rule regulating the conduct of a traveler upon a highway when about to cross a railroad track is not applicable to an employee about to cross the master's private railroad, the employee in such case being only bound to exercise reasonable care to avoid known or obvious danger, or danger which he was chargeable with notice of.

ERROR by plaintiff to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

Geo. Demming and *M. Hampton Todd*, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. This is an action brought by John Weiss against the Bethlehem Iron Company to recover

*See note at end of case.

damages for bodily injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The plaintiff went into the employment of the defendant company at its steel works on the evening of April 27, 1896. He worked at night from 6 o'clock in the evening to 6 o'clock in the morning, and his duties were to wheel fire brick and clay in a wheelbarrow to a place in the defendant's mill, where new furnaces were in course of erection, and to wheel therefrom old fire brick, and dump them at a refuse pile in the defendant's adjoining mold yard. While engaged in this latter work, shortly after 9 o'clock on the night of April 30, 1896,—the fourth night of his employment,—the plaintiff was struck by a moving car which crossed his pathway, and was badly maimed, under the circumstances and in the manner about to be related. In wheeling away the old fire brick in his barrow, the plaintiff pursued, as he was directed to do, a wheelbarrow runway which passed through an opening in the wall of the mill out into the mold yard, and proceeded through the yard to a right angle of the wall of the mill, and thence, turning to the left on a line parallel with the wall, and a few feet distant therefrom, to the refuse pile. The last-mentioned part of this wheelbarrow runway at one point crossed a narrow-gauge railway track, 2½ feet wide, upon which ran a "dinkey engine" and its "buggies" (a small locomotive and small cars), used in transporting molds from and into the mill. In coming out of the mill into the mold yard, this dinkey engine and its cars emerged through a doorway in the wall, which doorway was 11 feet, less 4 inches, wide. The distance from the outside of the wall to the middle of the wheelbarrow runway crossing was 7 feet. Immediately inside the doorway, within the mill, the railway track made a sharp curve, so that a person standing in the middle of the wheelbarrow crossing and looking into the mill through the doorway could see along the railway track only the distance of 19½ feet. Therefore, if the head of the engine were on the track inside the doorway, and 12½ feet distant therefrom, it would be invisible to a person at the wheelbarrow crossing under all circumstances. The dinkey engine was 19 feet long, and the length of one of its buggies or cars was 11½ feet. In coming out of the mill through the doorway, the engine sometimes pulled a car, and sometimes pushed a car ahead. Its ordinary rate of speed was from four to six miles an hour. Its usual signal before it emerged outside was its whistle,

Case Stated.

sounded a short distance—about 25 feet—inside the mill as it came around the curve already mentioned towards the doorway. Usually, however, there were three dinkey engines in constant use in the mill at the same time, moving upon several narrow-gauge railway tracks laid in various directions through the mill; and these three engines, it was testified: were giving signal whistles every few minutes all day and all night. A disinterested witness (Julien), speaking of these moving dinkey engines, said: "They always whistle; they are always going; never stop." It also appeared that there were several stationary engines in the mill near this locomotive doorway, whose whistles were sounding from time to time, and that other loud noises at that place were constantly made by the Bessemer blowers and otherwise. The plaintiff was 31 years of age. He was a German, who had only been in this country a few months before he went into the defendant's service. He had not previously worked in such an establishment, and had never been in the defendant's works before his hiring.

There was evidence tending to show that it was a rule at the defendant's works for the foreman to warn new men in regard to the danger from locomotives, but that no such warning was given to the plaintiff. The defendant's general foreman, Charles G. Barnes, who hired the plaintiff, testified. "As a rule, I generally caution the men about the tracks to be crossed, and the locomotive coming out on the tracks; but I don't know whether I told him [plaintiff] or not; I know I told the foreman of the bottom maker to tell him about it; to take him out and show him the tracks." It was not shown that any one had given such caution to the plaintiff. To the contrary, speaking of the dinkey engine which came out of the doorway into the mold yard and crossed the wheelbarrow runway, the plaintiff testified, "No one told me anything about that locomotive." The plaintiff testified that during each of the three nights he had worked before the night on which he was hurt he had wheeled six loads of old fire brick to the refuse pile, and, counting both his goings and returns, had thus crossed the railway track 12 times each of these three nights. He had wheeled, it seems, three loads on the fourth night before the trip on which the accident occurred. Thus, as he stated, he had crossed the track with his wheelbarrow altogether 42 times, computing both his going and returning. The plaintiff testified that only on one occasion had he seen the locomotive come out of the doorway

into the mold yard, and this on the first or second night of his service; and that on that occasion a man came to the doorway, looked out, and beckoned with his hand for the engine to come on, and that this man came out, and the engine followed him. No part of this testimony was contradicted. In one particular it was corroborated, as we shall more fully see hereafter.

On the occasion when the plaintiff was run down, the locomotive, it would seem, was moving at its usual speed, and blew its usual signal whistle inside the mill at the customary place, but no other precaution was observed. The engine was pushing a car ahead. The car was loaded with molds, which, it was testified, would show a "cherry red" in the dark. There was no light on the car, nor was any person on it. The engineer, speaking of the plaintiff, testified, "I couldn't see him; there were molds on the top of the buggy." Presumably, then, the plaintiff could not see the engineer or the head of the engine. In the mold yard there was an electric arc light perhaps 150 feet from the crossing. As to the effectiveness of this light at the place of the accident there was some conflict of evidence.

With reference to the accident the plaintiff testified in substance as follows: That as he approached near to the railway track, and before starting to cross it, he listened and looked, and he heard nothing and saw nothing; that he then went straight ahead, without stopping, and shoved his wheelbarrow over the track; that he himself had reached the middle of the railway track when he was struck by the car, and dragged by it seven or eight yards. In response to the question asked by the court, "Why did you do that [listen and look] if you had never seen an engine pass along that track but once in all your experience?" the plaintiff answered: "I looked and listened, and when that man came out before to see whether everything was right—that was the reason I looked and listened. I looked for the man to come." The plaintiff stated that while he was upon this trip, and after he had started from the mill, he heard the whistle of a locomotive inside, but that the locomotives were constantly whistling inside the mill as he passed along the wheelbarrow runway.

The counsel for the defendant insist "that as a matter of law the plaintiff, upon the evidence in this case, cannot recover." But this proposition is wholly inadmissible. The supreme court of the United States has declared that it

is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court. Railway Co. *v.* Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railway Co. *v.* Gentry, 163 U. S. 353, 365, 368, 16 Sup. Ct. 1104. And the court there made observations which we do well to bear in mind here:

"What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions of the court. It is their province to note the special circumstances and surroundings of such particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs."

As was said in Railway Co. *v.* Gentry, *supra*, so we say of the present case that it was "one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching conclusion." The evidence, we think, fairly justified a finding that the crossing at which the plaintiff was injured was a place of special danger. As we have seen, the wheelbarrow runway crossed the railway track in front of and only seven feet from a comparatively narrow doorway out of which a dinkey engine and its cars emerged. A sharp curvature of the railway track inside the doorway prevented a sight of an approaching locomotive or car until it was within 20 feet of the crossing. It was no unusual thing—as happened in the instance under investigation—for the engine to push ahead a car without outlook or light upon it. The only signal of approach usually given—and the one given on this occasion—was a whistle from the locomotive while it was inside the mill, and not visible from the crossing. There was evidence tending to show that the defendant's superintendent and foreman regarded this crossing as particularly dangerous, and that the habit was to warn new and inexperienced employees against this danger. The plaintiff testified that no such warning was given to him, and in this statement he was thoroughly corroborated. Under the evidence a finding that he was so cautioned could not have been sustained. The plaintiff was entirely inexperienced when he entered the defendant's service. This was known to the defendant's foreman when the plaintiff was hired. The plaintiff worked at night. He

was injured in the early part of the fourth night of his service. He testified that only once had he seen the locomotive come out through this doorway, and that then a man came before, apparently to give warning of its approach.

Whether, with respect to evidence tending to establish the recited state of facts, the instructions which the court gave to the jury were appropriate and adequate, let us now consider. The court substantially affirmed the plaintiff's fourth point, which was to the effect that, if the jury found that the plaintiff had received no special instructions in regard to the mode in which the engine came out of the doorway, and his personal observation justly lead him to believe that every time it came out some one preceded it to warn him and his fellow workmen off the track, and the plaintiff had no other reasonable way of better informing himself, the jury should find that the defendant failed in its duty to give instructions ; but, after so charging, the court immediately added :

"The plaintiff, in presenting his case through his counsel, has laid a good deal of stress on the position stated in the point just read to you, and if you render a verdict for him it is not at all improbable that it will be based upon this point. I therefore call your attention to the fact that the only evidence that the plaintiff had any justification for supposing the engine when it approached the crossing was preceded by a man to give warning is to be found in his own testimony, which is to the effect that upon the only occasion when he saw an engine come out of the doorway and approach the crossing it was preceded by such an individual. So that the fact upon which this point is predicated is testified to by the plaintiff alone. Now, if the case is put upon that point, you must bear in mind that the point is predicated and supported by the testimony of the plaintiff alone. That may be sufficient, if it satisfies your mind fully, in view of the other evidence, it is. But you must not overlook the fact that this is the testimony of the plaintiff ; that he is interested to the extent of all involved here, and must remember that other witnesses who have been called, who are disinterested, and who spoke upon this subject, said that it was not the practice so to warn persons of the approach of an engine to that crossing ; that they never knew it to be done in all their experience ; that the method of giving such warning was by means of a whistle, and no other. It is for you to say whether this occurred as the plaintiff has testified, or whether he was mistaken respecting it."

The proposition embodied in the plaintiff's fourth point had a most important relation to the case. The court, indeed, went so far as to say to the jury that, if they rendered a verdict for the plaintiff, "it is not at all improbable that it will be based upon this point." It was, therefore, a matter of great moment to the plaintiff that the instructions of the court should be accurate. The plaintiff's statement as to what he saw on the first or second night of his service in respect to a man preceding the locomotive as it issued through the doorway was circumstantial. It was either a truthful statement or a fabrication. If true, it was a great fact in the case, to which the jury should have given the most serious consideration in connection with the evidence bearing upon the defendant's alleged neglect of duty to the plaintiff in failing to give him warning against a danger which was not obvious. As we have seen, the court said that "the point is predicated and supported by the testimony of the plaintiff alone," and that he was "interested to the extent of all involved here," and that other witnesses "who are disinterested," and who had spoken upon this subject, said "that it was not the practice so to warn persons of the approach of the engine to that crossing; that they never knew it to be done in all their experience; that the method of giving such warning was by means of a whistle, and no other." Evidently these instructions were calculated to discredit the plaintiff with the jury. Now, in so charging the learned judge had overlooked the testimony of the brakeman (Julien), who, upon cross-examination by the defendant's counsel, had testified thus:

Instructions.

"Q. Had you ever known anybody to run ahead of the locomotive? A. When they are in there loading molds off the front of the foundry, the brakeman always walks out there. Q. Repeat that again. A. I say when there is molds come out of the foundry, and get put off at the other crane, the engine lays there at the dump empty, and the brakeman runs ahead."

This testimony, we think, tended to corroborate the plaintiff in his statement as to what he had observed. In view of this evidence, there certainly was error in the above instructions. Moreover, the erroneous statements of the court upon this subject were extremely hurtful to the plaintiff, and perhaps fatal to his case. The bill of exceptions, indeed, shows that in a supplemental charge to the jury the court, among other things, said:

"And you have been sent for to be informed that the plain-

tiff's counsel has called the attention of the court to a few lines of testimony of the witness Julien, called by him, which he desires you to hear read. I told you that I did not see any testimony corroborative of the plaintiff's statement that the only time he saw the engine leave the building and cross the track it was preceded by a man to ascertain whether the track was clear. The plaintiff's counsel thinks there is such corroboration in the lines which he will now read to you. [The lines were then read.] After reading, the court said, this testimony had not impressed it as it had the counsel, but that its effect and value was for the jury, to whom it was submitted."

Was this a sufficient correction of the error into which the court had fallen? We are constrained to answer negatively. The plaintiff was justly entitled to an unequivocal withdrawal of the previous erroneous statements of the court. The jury may well have understood that no retraction whatever was intended, but that the court adhered to the views it had previously expressed.

We now turn to the charge of the court upon the subject of the defendant's alleged negligence. Here it will be necessary for us to quote the major part of the instructions. We give all that are here material. The court said:

"In the case before us the plaintiff charges that the place where he was put to work was dangerous, and unnecessarily so. The only cause of danger pointed out which we are called upon to consider is that arising from the railroad crossing where he was injured. If any other cause of danger existed, it is not important, because it did not contribute to the injury. The precaution taken by the defendants to guard against danger at this crossing was the sounding of a whistle as the engine approached as notice of the approach. This is the usual signal adopted for such purpose. Unless, therefore, the circumstances existing at this crossing were such as to render this method of giving warning insufficient, you should find the defendants not to have been careless in this respect. I repeat: Unless the circumstances existing at this crossing were such as to render this method of signaling by whistling insufficient, you cannot properly find the defendants to have been careless in this respect. What else or more was it reasonable to expect or require of the defendants? You have heard the evidence on the subject,—a description of the situation and surrounding circumstances; you have heard the discussion of it by counsel on one side

and on the other, and I will not dwell upon the question. Were the circumstances at this crossing such as to require any other signal than that established by the rules of the company? Was it insufficient? Does the evidence show it to have been insufficient? It is the usual signal, and so far as appears, the universal signal at railroad crossings generally. Was there anything here to require a different signal, or an additional signal. To the court it seems that the sounding of the whistle was sufficient to render the crossing reasonably safe, with the exercise of proper care by the plaintiff, with knowledge on his part of the situation. The case, however, is submitted to you, and you have the responsibility of deciding it. Had the plaintiff knowledge of the situation, or was the defendant remiss in failing to impart such knowledge to him? You have heard the testimony on that subject,—his own and that of defendant's witnesses. He had been repeatedly over the route, back and fourth, on which he worked. He had seen the railroad, and the engine and cars upon it, upon one occasion at least. Would or not his eyes of themselves inform him fully in respect to the situation? * * * With these observations, and in view of the very thorough discussion of the subject by counsel, I submit to you the question, were the defendants guilty of negligence in the respects stated as complained of; that is, in not providing for safety at that crossing, or by withholding, or failing to give proper information respecting the method of operating the cars upon the road at that point? I feel it to be my duty to say to you that I do not think the evidence justifies a conclusion that the defendants failed in their duty in this particular. I do not take the question from you. I submit it to you. The responsibility will be upon you of deciding it justly. But you ought not to reach a conclusion on the subject without exercise of great care and the best judgment you possess. You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment. The real question here in this respect is whether or not proper warning was given to this man at that crossing, or whether he was misled respecting it for want of proper information. These are the questions, and the only questions, that the court sees, as respects this branch of the case; and I repeat what I have said, that in the judgment of the court the evidence on one side and the

other, properly considered, does not justify a conclusion that the defendant omitted or failed in any part of its duty in this matter. I repeat, however, so that you will not misunderstand me, that the question is one of fact, which is submitted to you."

Instructions.

Touching these instructions, our first observation is that no reference is here made by the court to the highly important evidence tending to show that this crossing was considered by the defendant itself a place of peculiar danger, and that it was customary to give particular warning of that danger to new and inexperienced workmen. We find no allusion whatever to this evidence in any part of the charge. This omission is the more to be regretted because the proof was that the plaintiff had not been warned. Again, the attention of the jury was not here directed to the fact that the plaintiff was a new and inexperienced hand, whose term of service had been very brief, extending only into the fourth night. Indeed, the charge assumed that the plaintiff had acquired full knowledge by observation. Furthermore, the court made no mention in detail of the unusual facts relating to the crossing and the manner of its use, which we have recited. Yet, without close attention to the special circumstances, the jury could not rightly determine whether the defendant had acted with due prudence, and with reasonable regard to the safety of the plaintiff. In all these particulars we are obliged to say that the instructions of the court were incomplete and inadequate.

Same.

Then, again, the court, in effect, charged the jury that the defendant had performed its whole duty when it sounded a whistle in approaching the crossing, although the uncontradicted proof was that such signal was given when the locomotive was invisible to one approaching the crossing, and was given inside the mill, where other locomotives were continually giving like signals. In view of the exceptional facts, the instructions upon this point, we think, were too favorable to the defendant.

Still further, the court said: "You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary for you to form a reliable judgment." This instruction, it seems to us, was calculated to mislead the jury. It might not have misled a trained lawyer, but its effect on a jury

might well be to unduly restrict legitimate inquiry. As we have already said, the determination of the facts of this case was peculiarly for the jury, and it was their province to consider all the circumstances and surroundings.

Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous. Rea *v.* Missouri, 17 Wall. 532, 543. Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence. Hall *v.* Weare, 92 U. S. 728. If an instruction fails to present with sufficient distinction a material fact which may have a controlling effect, there is ground for reversal. Ayers *v.* Watson, 113 U. S. 594, 609, 5 Sup. Ct. 641. It is error for the court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case. Canal Co. *v.* Harris, 101 Pa. St. 80; Reichenbach *v.* Ruddach, 127 Pa. St. 564, 595, 18 Atl. 432; Young *v.* Merkel, 163 Pa. St. 513, 520, 30 Atl. 196.

Same.

Upon the subject of alleged contributory negligence on the part of the plaintiff the court charged the jury as follows:

"Aside altogether from the questions whether the defendant was guilty of fault or negligence, could the plaintiff, by the exercise of such care as a man should exercise under such circumstances where there is danger, by the exercise of such care have seen or heard the engine? One of the witnesses called, who appears to be entirely disinterested,—though you will say how much confidence should be reposed in his testimony,—says that he saw the plaintiff approach the railroad on this occasion, saying that he saw him back some distance from the track, describing the situation. He says he heard the whistle of the engine, and knew that it was coming; that he watched the man come steadily on, apparently without looking, and certainly without stopping, passed directly on the track in front of the engine, and was struck. Now, is that so? If it is, there can be no question about his negligence. In a situation like that it was his duty to be on his guard. There is nothing in the case that excuses him from the exercise of proper care. If he did pass steadily on from the point where this witness saw him, as the witness says he did, without taking any precaution to guard himself against the danger of coming into collision with the

engine, there cannot, in the judgment of the court, be any room for doubt that he was guilty of contributory negligence. He says that he stopped and looked and listened. It is for you to say whether that is the case. The witness to whom I refer says that he did not, and he is apparently disinterested. * * * "

We here note, first, that the court made an inadvertent mistake in saying that the plaintiff had testified that he had stopped before crossing the railway track. The plaintiff did not so testify, but stated the reverse. In consequence of this misapprehension, the court submitted to the jury a question of veracity as between the plaintiff and the witness Jacoby. No such issue, however, could be raised properly, for the supposed discrepancy in the testimony of the plaintiff and that of the other witness did not exist. But, aside altogether from this inaccurate statement, we are not able to concur in the views of the court upon the question of the plaintiff's alleged contributory negligence in not stopping before he attempted to cross the railway track. In substance and effect the court charged the jury that, if the plaintiff did not stop, he was guilty of contributory negligence. Now, the "stop, look, and listen" rule regulating the conduct of a traveler upon a highway when about to cross a railroad track is not the criterion by which to determine the degree of care which was incumbent upon the plaintiff. The difference between an ordinary railroad traversed by trains running at high rates of speed and the defendant's private railway in structure, equipment, location, and use is so great that the general rule governing the crossing of the former is not applicable to the latter. Again, the relation between the plaintiff and the defendant was very different from that which exists between a railroad company and a traveler upon a highway crossing the railroad. The defendant set the plaintiff to work upon its wheelbarrow runway, which crossed its railway track, and the plaintiff, in the performance of his work, necessarily crossed the railway, not upon the implied invitation of the defendant simply, but by its direction. The defendant was under a legal obligation not to expose its servant, when conducting its business, to unnecessary peril against which he might have been guarded by reasonable diligence on the part of the defendant. Hough *v.* Railway Co., 100 U. S. 213, 217. The plaintiff had a right to assume that the defendant would not subject him to needless danger, and

Injury to Employee Crossing Master's Private Railroad—Due Care.

hence his watchfulness would naturally be diminished. The plaintiff was bound only to observe reasonable care to avoid danger which was obvious, or which was known to him, or of which he might have acquired knowledge by the exercise of proper attention. Whether the plaintiff was guilty of contributory negligence was a question for the determination of the jury upon a consideration of the peculiar circumstances surrounding the case and in the light of all the evidence.

We find support for these views in the opinion of the supreme court of the United States in the recent case of Warner *v.* Railroad Co., 168 U. S. 339, 347, 18 Sup. Ct. 68, where it was held that the rule requiring a traveler upon a highway in crossing a railroad to stop and use his eyes and ears to ascertain whether a train is approaching did not apply to a person who was crossing a track at a station to get on a train. The court said that the person so crossing the railroad did so upon the implied invitation of the railroad company, and that, while such implied invitation would not absolve him from the duty to exercise care and caution in avoiding danger, "nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution." The court added that the railroad company, in giving the invitation, must be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the court held that it was a question for the jury, under all the circumstances, whether the plaintiff's intestate was chargeable with contributory negligence.

The judgment is reversed, and the cause is remanded to the circuit court with direction to set aside the verdict and grant a new trial.

BRADFORD, District Judge, concurs.

DALLAS, Circuit Judge, dissents.

NOTE.

Crossings—Duty of Employees to Stop, Look, and Listen.—The rule requiring persons about to cross a railway track to look in both directions for approaching trains is not applicable, in its strictness,

to employees at work on the track. Crowley *v.* Burlington, C. R. & N. Ry. Co. (Iowa), 18 Am. & Eng. R. Cas. 56. In Ominger *v.* N. Y. Central & H. R. Ry. Co., 4 Hun 59, it is held that the rule which requires a traveler about to cross a railway track to look in both directions for approaching trains is not applicable, in its strictness, to an employee at work on the track, because such an obligation would be inconsistent with proper attention to his work. In Goodfellow *v.* B. H. & E. Ry. Co., 106 Mass. 461, the plaintiff was the employee of a contractor at work for the defendant. He was holding the guy of a derrick, and an engine backed down and injured him. At the trial a verdict was directed for the defendant, and the ruling was reversed. The court said: "There is evidence that he was rightfully where he was, and was not in fault in being engrossed in his work and unaware of the approach of the engine until it was too late to avoid it."

GEORGIA RAILROAD & BANKING CO.

v.

CROMER.

CROMER

v.

GEORGIA RAILROAD & BANKING CO.

(*Supreme Court of Georgia, Nov. 19, 1898.*)

Accident at Crossing—Speed—Signals—Negligence—Questions for Jury.*—Where a railroad crossing is in a populous locality, and is much used by the public, but the same is not within the limits of an incorporated city or town, and is not a part of a public road established pursuant to law, which rate of speed in approaching and running over such crossing would be negligence, and what signals ordinary care would require to be given, are matters to be determined by a jury according to the circumstances of each particular case.

(Syllabus by the Court.)

ERROR by both parties from Greene county superior court. Action by J. A. Cromer, administrator, against the Georgia

*See notes at end of case.

Railroad & Banking Company. Judgment for defendant, and both parties assign error. *Judgment affirmed on main bill, and cross bill dismissed.*

Jos. B. & Bryan Cumming and *J. B. Park, Jr.*, for plaintiff in error.

Saml. H. Sibley, for defendant in error.

COBB, J. Emma Parrott sued the Georgia Railroad & Banking Company for damages sustained by her growing out of the homicide of her husband by the defendant company. She died pending the suit, and her administrator was made a party. The petition alleged that the deceased was driving a team of mules and a wagon upon the public road in the village of Union Point from the vicinity of the stores on the south side of the railroad crossing to the north side thereof; the crossing being a regular public crossing, 100 yards east of the depot of the defendant. As deceased approached the crossing, the railroad eastward was hidden from his sight for a distance of half a mile by two cotton-seed warehouses erected on the right of way with the knowledge and consent of the company, and by bushes left growing on the right of way, and by a freight car left standing near the crossing and the seed houses. No train was due from the east at the time that deceased started to cross the track, and his attention was fixed upon another train of defendant, which was shifting near the crossing, and to the westward of it. Just as the deceased got upon the crossing a train approached from the east, 30 minutes behind its schedule time, running at the rate of 30 miles an hour. There is no blow post erected at said crossing, and in approaching the same no signals were given, and the speed of the train was not slackened. The collision between the engine of the train and the wagon upon which deceased was riding occurred upon the crossing. It is alleged that "said homicide of her husband was due to the gross negligence of said company in permitting said bushes and houses and freight car to thus obstruct the approach to said crossing, in not having a signal post therefor, in running said train at said high rate of speed in the limits of a town and across a public crossing, and in making no sound or signal in approaching thereto to warn travelers upon the highway." Upon the trial it appeared that Union Point was an unincorporated village, having about 1,000 inhabitants; that the residence portion of the village was on one side of the railroad, and the business houses on the other; and that

the crossing in question, which goes from the north to the south side of the town, is the only crossing immediately within the settlement, and is the one which is used by the inhabitants of the village in passing from one side of the town to the other; that deceased at the time that he was killed was going from the south to the north side of the town; that to the east of the crossing, and on the south side of the track, were two cotton-seed houses, about 12x20 feet each; and that a freight car was between the crossing and the seed houses. The car was on a side track between the seed houses and the main line. The seed houses are from 40 to 50 yards from the crossing. The main line is straight for a half mile to the east. The seed houses and some bushes not taller than a wagon would obstruct a person's view in approaching the crossing. The wagon road which crosses the railroad is not a public road established pursuant to law. When deceased was seen approaching the crossing his attention seemed to be diverted to a train which was shifting on the west of the crossing. The evidence was conflicting as to whether any signal was given, either by whistle or by bell. There was evidence tending to establish that certain persons, section hands, and others, who were in a position to see the approaching train, signalled the deceased, by shout, to call his attention to the train, but he did not seem to hear, or, if he did, did not heed the warning; his attention being, as stated, drawn to the shifting train on the west of the crossing. The engineer testified that he was running about 15 miles an hour when he struck the wagon, and that he gave the station signal before reaching the crossing, and began to slacken his train; that before he commenced to slacken he was running about 45 miles an hour, and thinks that he had reduced his speed to about 15 miles an hour. From the testimony of the engineer and other employees upon the train, it appears that, after the deceased was seen upon the track in a position of peril, all that diligence required was done to stop the train. The jury returned a verdict for the plaintiff for $600. A motion for a new trial made by the defendant was overruled, and it excepted. No error of law is complained of, and the motion is based solely upon the grounds that the verdict was contrary to evidence, and without evidence to support it.

The collision not having occured at a public road crossing, he defendant was under no statutory duty to give a signal

or check the train in approaching thereto. Civ. Code, § 2222; Comer *v.* Shaw, 98 Ga. 543, 25 S. E. 733. Within the limits of incorporated cities and towns and outside of such limits wherever a line of railroad crosses a road which has been established pursuant to law, a railroad company, in the operation of its trains, is bound to give such signals and perform such acts as are required by statute in the latter case, and those which may be required by such reasonable regulations as the municipal authorities may prescribe in the former. A failure in either case to comply with the requirements of the law applicable would amount to negligence in law. In the case of Comer *v.* Shaw, cited *supra*, CHIEF JUSTICE SIMMONS uses this language: "Where a railroad crossing is in a populous locality, and is much used by the public, even though the provisions of Civ. Code, § 2222, are not applicable, greater care is required of railroad companies with respect to speed and signals than is to be expected at places where the railroad is crossed by unfrequented country roads not established by law as public roads; but noncompliance at such a place with the statutory requirements applicable to public roads established by law is not, as a matter of law, negligence *per se*. It is generally for the jury to say whether, under such circumstances, the railroad company was negligent or not. This distinction is also to be taken into consideration when we come to consider the conduct of persons attempting to cross the railroad at such places. Where the crossing is one to which the statutory requirements above referred to are applicable, a person about to cross has a right to expect that the railroad company, in the running of its trains, will comply with these requirements; and reliance upon the discharge of its duty in the premises may, in some degree, excuse a want of full diligence on his part in looking out for the approach of a train. Where, however, the statute is not applicable, a person about to cross must assume a greater burden of care than he would be required to assume if the crossing were one to which the statute applied." In the case of Thomas *v.* Railroad Co., 19 Blatchf. 553, 8 Fed. 729, WALLACE, J., says: "Railroad corporations may ordinarily maintain such rate of speed with their trains as they see fit. They may even permit their officers to enjoy the luxury of special trains, and dash over their roads with a single car, almost noiselessly, and at lightning speed. They may use their side tracks near the intersection of highways or private roads for the storing of

Notes

empty cars. While these things may not be agreeable to the general public, they are, nevertheless, within the privileges with which railroad corporations have been invested; and the public have no right to complain, because they are legitimately within these privileges. But, when these privileges come in collision with the rights of those who use the highways or private roads to cross the railroad, they must give way, because, as to these persons, the railroad corporation is under the obligation of exercising reasonable care to prevent injury. What is reasonable care, or, conversely, what omission of precaution is negligence, can only be defined by general propositions; the application of which must depend upon the circumstances of the particular case." Applying these principles to the case under consideration, it was for the jury to determine whether, under all the circumstances, it was the duty of the railroad company to have given a signal of the train approaching this crossing, and to have slackened the speed of the same, and, if in this respect there was a failure of duty on the defendant's part, then whether the deceased by the exercise of ordinary care could have avoided the consequences of its negligence in not giving the signal and reducing the speed of the train. It appearing from the record that two juries have decided these issues in favor of the plaintiff, and there being no complaint whatever of the manner in which the case was tried, or in which the judge submitted it to the jury, we will not interfere with his discretion in refusing a new trial. Judgment on main bill affirmed; cross bill dismissed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LEWIS, J., disqualified.

NOTES.

Crossings—Speed—Negligence—Question for Jury.—While it is the right of the company to choose and regulate its own speed, the right is not wholly unaffected by surrounding or attendant conditions, and may be negligently as well as rightly exercised. Salter *v.* Utica, etc., R. Co., 88 N. Y. 42; Thomas *v.* Delaware, etc., R. Co., 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533.

Unless otherwise prescribed by statute or ordinance, a train may run at such rate of speed as the exigencies of the railroad company may require, and preserve this speed at the usual crossings notwith-

standing the approach of vehicles upon the highway; and under ordinary circumstances it will not be considered either gross or ordinary negligence, or what is called want of ordinary care. Telfer *v.* Northern R. Co., 30 N. J. L. 192; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576

"While a railway is not restricted by law to any rate of speed, unusual speed at crossings, or at other places where men or brutes may be exposed to danger from passing trains, may be considered in connection with other matters, as the failure to give signals of the approach of the train, and the like, to determine the want of care on the part of those operating it." Artz *v.* Chicago, etc., R. Co., 44 Iowa 285.

The fact that the charter of a railroad company gives it the power to regulate the speed of its trains does not exempt it from the restriction imposed by an ordinance limiting the speed of trains. The exercise of the police power by the state cannot be restricted by such charter grants. Cleveland, etc., R. Co. *v.* Harrington, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.

And it is generally a question of fact in each case whether the actual rate was excessive or dangerous. Wilds *v.* Hudson River R. Co., 29 N. Y. 326; De Loge *v.* New York Cent., etc., R. Co., 92 Hun (N. Y.) 149; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549; Huntress *v.* Boston, etc., R. Co., 66 N. H. 185; Pratt *v.* Chicago, etc., R. Co., 98 Iowa 563.

While, in the absence of municipal regulations, no rate of speed is negligence *per se*, still it does not follow that a company may at all times and places run its trains at any rate of speed. A high rate of speed at a country crossing may be considered by the jury as tending to show negligence. Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

Where the evidence introduced by the plaintiff showed that although the defendant was running its trains at a negligent rate of speed, still there was no connection between the rate of speed and the accident, but the injury was caused by the forgetful and neglectful state of the deceased at the time, it is the duty of the trial court to direct a verdict for the defendant. Powell *v.* Missouri Pac. R. Co., 76 Mo. 80, 8 Am. & Eng. R. Cas. 467.

SIMONS' ADM'R

v.

SOUTHERN RY. CO.

(*Supreme Court of Appeals of Virginia, June 16, 1898.*)

Accident at Crossing—Substituting Other Signals for Statutory Signals.*—It is not within the province of the appellate court to determine, as matter of law, that a certain signal is a sufficient substitute for one positively required by statute to be given from railroad trains approaching public crossings.

Same—Liability.—And where the fact of such substitution was conceded, plaintiff was entitled to recover, unless it appeared that his decedent was guilty of contributory negligence when attempting to cross the track.

Testimony.—The views expressed in Railway Co. *v.* Bryant, 95 Va.—, 28 S. E. 183, upon the subject of positive and negative testimony, approved.

Case at Bar.—It appeared from the evidence that his decedent, and another man, when they knew they were approaching an unfamiliar public crossing, were seated in an open one-horse vehicle, and were driving slowly, and keeping a sharp lookout, and listening for trains; that the night was very dark, and the view in the direction from which the train inflicting the injury came was much obstructed by permanent objects; and that their vehicle while crossing the track was struck by defendant's engine, and plaintiff's decedent was instantly killed. *Held*, that the court should have entered verdict for plaintiff in accordance with the finding of the jury; defendant having admitted that a signal was given from the approaching train different from the one required by statute.

ERROR by plaintiff to Lunenberg county circuit court. *Reversed.*

Wm. H. Mann and *G. S. Wing*, for plaintiff in error.

B. B. Munford, for defendant in error.

KEITH, P. About 6 o'clock on the evening of December 27, 1895, W. H. Simons and Walter and John Rutledge un-

*See note at end of case.

dertook to cross the tracks of the Southern Railway Company at a point a short distance south of Meherrin Station. They were seated in an open vehicle, drawn by one horse. Simons was driving. They had traveled during the course of the day a distance of about 40 miles. They had no particular acquaintance with the road, but knew that they were approaching the point where it crossed the railway, and were driving cautiously and carefully, and keeping a sharp lookout. It was not raining, but no stars were visible, and the night was very dark. Just as they got upon the track a passenger train coming from the south struck the vehicle, killed Simons, broke the leg of Walter Rutledge, and John Rutledge, who occupied a seat with Simons, the driver, escaped by leaping across the track in front of the engine.

Case Stated.

This suit was brought to recover damages for the alleged negligent killing of Simons by the defendant company.

The declaration contains three counts, only one of which will be noticed. The second count states as the cause of action that "while the said W. H. Simons, without any fault on his part, was traveling along said public road or highway, and over said railroad crossing, as he had the right to do, the Southern Railway Company carelessly and negligently failed and refused to cause the whistle on its locomotive engine to be at least twice sharply sounded, not less than three hundred yards before its locomotive reached the said highway crossing, and by reason of its said negligence, in so failing to blow, or cause to be blown, the whistle of its locomotive engine three hundred yards before reaching said crossing, as it had a right to do, the said defendant negligently, carelessly, and wrongfully caused or permitted its said engine, to which was attached a train of cars, to be violently, and with very great speed, driven against and upon the said Simons, inflicting fatal injuries, on account of which said injuries, so carelessly, negligently, and wrongfully inflicted by the said defendant on the said Simons, he, the said Simons, then and there died; to the damage of the said plaintiff $10,000."

Upon the trial the defendant demurred to the plaintiff's evidence, and the jury rendered a verdict for $8,500, upon which verdict the circuit court entered a judgment for the defendant, and the case is before us upon a writ of error granted by one of the judges of this court.

Simons' Adm'r *v.* Southern Ry. Co

By an act of assembly (Acts. Assem. 1893-94, p. 827) it is provided "that a bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached: provided, that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless required by the council of any such city or town, and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

It is conceded that this case does not come within the exceptions named in the statute; that it was the duty of the company to sound its whistle as above prescribed; and that this duty was not performed. The negligence of the defendant company being thus established, it can only escape its consequences by showing that the damages suffered by plaintiff's intestate were not sustained "by reason of such neglect." The defendant in error relies upon the fact that at the whistling post, 484 yards to the south of the crossing, the station signal was sounded; that this signal, which is a loud long blast, is in all respects a better and more efficient warning of approaching trains than the two sharp blasts of the whistle required by the statute. There is a discrepancy in the statement of witnesses as to the point at which the station signal sounded, but taking the view most favorable to the defendant in error, and conceding that the whistle was blown for Meherrin Station at the whistling post, we cannot determine, as matter of law, that it was a sufficient substitute for the signal required by statute.

Accident at Crossing—Substituting Other Signals for Statutory Signals.

As was said by JUDGE BUCHANAN in Atlantic & D. Ry. Co. *v.* Rieger, 95 Va. —, 28 S. E. 590: "The legislature had determined where the whistle was to be sounded, and it was not for the court or the jury to determine that sounding it at some other place or in some other manner was equally as good. The question which the jury had to determine was not whether one kind of warning was as good as another, but whether, under all the circumstances of the case, although the defendant may have failed to sound the whistle in the manner required by statute, the plaintiff's injury was proximately caused by the defendant's negligence."

Granting, therefore, to the defendant, that the station sig-

nal was sounded as its counsel contends, it yet remains that upon the night in question the train of the defendant company approached the scene of the accident under the imputation of negligence resulting from a failure to obey the positive mandate of the statute law. The negligence of the defendant in error being shown, the plaintiff in error was entitled to recover, unless it shall appear that Simons was guilty of contributory negligence. Same—Liability.

The evidence shows that on the evening in question Simons and his companions passed Meherrin Station, going south, at about 6 o'clock; that as they passed along the country road, in the direction indicated, the Southern Railway track was a short distance to their left; that about one-half mile south of the station the county road turns to the left, and crosses the railway obliquely; and that on the right of the county road there was a growth of bushes upon an embankment five or six feet higher than the level of the roadway. There is evidence tending to show that the approaching train could not have been seen from the roadway, on account of the woods, until a point was reached 30 feet from the center of the track. See testimony of Walter Davis. After passing this point, the view again becomes obstructed for a distance of 10 or 15 feet, and when within about 18 feet of the track there is a space of 6 or 8 feet, through which a train approaching from the south is again visible when within 200 feet of the crossing. The evidence shows, as has been stated, that the night was dark; that the horse driven by the plaintiff's intestate had gone a long day's journey, and was fagged out; that Simons and his companions were moving slowly along the public highway, and looking out for the crossing, which they knew to be near at hand, and listening for an approaching train. Under these circumstances, their vehicle while crossing the track was struck by the engine, and Simons was instantly killed.

There was much discussion at the bar over minor controversies suggested by the evidence, which we do not feel called upon to decide.

We do not feel qualified to discuss the laws of acoustics, and we deem it unnecessary to add to what has been said by this court upon the subject of positive and negative testimony, but are content with the views expressed upon that subject in Railway Co. *v.* Bryant, 95 Va. —, 28 S. E. 183. Testimony.

Note

Upon a demurrer to the evidence, the court is required to make all the presumptions in favor of the verdict that a jury might have made had not the case been withdrawn from it. Johnson *v.* Railroad Co., 91 Va. 171, 21 S. E. 238. It is true that the proof of the failure on the part of the railway company to give the signal required by statute and proof of injury to the plaintiff are not, of themselves, sufficient to support a verdict against the company. On the other hand, when it is said by courts and text-books that a causal connection must be shown between the breach of duty or act of negligence and the injury, nothing more can be meant than that the evidence must tend to establish such a relation between them as, according to ordinary experience of mankind, warrants the conclusion that the injury would not have happened had not the negligence occurred. Nor will it be denied, we apprehend, that judgment upon the demurrer should have been given for the plaintiff, if there were facts before the jury from which it might have inferred that the conceded negligence caused the injury suffered.

Applying these principles to the facts, it seems to us manifest that the jury would have been well warranted in finding a verdict against the defendant in error.

We are of opinion that the circuit court should have entered judgment for the plaintiff in error.

NOTE.

Signals at Crossings—Character of Warning.—The warnings given for crossings must be of such a character and made at such a time that they will serve to protect the traveler from injury if he be in the exercise of ordinary care. Continental Imp. Co. *v.* Stead, 95 U. S. 161; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627; Bleyle *v.* New York, Cent., etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993; Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

"While the law does not point out any particular mode or manner in which notice of approaching trains shall be given, it does require that some suitable and adequate means adapted to the circumstances shall be adopted and applied." Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

The signal given should be the one prescribed by the statute for the particular locality. Cleveland, etc., R. Co. *v.* Asbury, 120 Ind. 289; New York, etc., R. Co. *v.* Leaman, 54 N. J. L. 202.

Malmstrom *v.* Northern Pac. Ry. Co

Where there is no statute designating the character of the signal necessary to be given, the company must adopt such signals as are usual and customary. Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338; Georgia Pac. R. Co. *v.* Freeman, 83 Ga. 583.

In the absence of specific requirements as to signals, warnings must be given in a reasonable manner. Crawford *v.* Delaware, etc., R. Co., 54 N. Y. Super. Ct. 262.

Statutes requiring signals by bell or whistle do not under ordinary circumstances require the use of both. East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Rowen *v.* New York, etc., R. Co., 59 Conn. 364; Chicago, etc., R. Co. *v.* Damerell, 81 Ill. 450; Ohio, etc., R. Co. *v.* Reed, 40 Ill. App. 47; St. Louis, etc., R. Co. *v.* Pflugmacher, 9 Ill. App. 300; Tyler *v.* Old Colony R. Co., 157 Mass. 336; Braddy *v.* Kansas City, etc., R. Co., 47 Mo. App. 519; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578, 19 Am. & Eng. R. Cas. 506; Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270; McCormick *v.* Kansas City, etc., R. Co., 50 Mo. App. 109; Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48; Terry *v.* St. Louis, etc., R. Co., 89 Mo. 586; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578, 19 Am. & Eng. R. Cas. 506; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 45 Am. & Eng. R. Cas. 28.

MALMSTROM

v.

NORTHERN PAC. RY. CO. *et al.*

(*Supreme Court of Washington, Nov. 21, 1898.*)

Accident at Crossing—When Negligence Independent Cause.*—Although plaintiff was chargeable with having assumed all the other risks attending his attempt to cross defendants' track at night on a trestle in a town, at a point habitually used as a crossing by the public, but which plaintiff knew was unsafe, he did not assume the risk of being run into and injured by a backing train having no lookout upon the rear car, while he was on the trestle with his foot caught between the ties, he and his companion having endeavored to have the train stopped when they saw it approaching from a considerable distance.

Nonsuit—Order of Proof.—Plaintiff admitted in his reply that he

*See notes at end of case.

had signed a paper purporting to release defendants from liability on account of the injuries sued for, but alleged that he had been fraudulently induced to sign it, and defendants moved for a nonsuit at the close of plaintiff's case on the ground of such admission. *Held*, that the motion was properly overruled, plaintiff, under a ruling not excepted to, having a right to hold back his evidence as to the circumstances under which the release was signed, until after defendants had read it to the jury.

Release—Tender.—As the recovery exceeded the amount paid for the release, it was not necessary to consider on appeal whether it was incumbent upon plaintiff to tender defendant such amount before commencing the suit.

APPEAL by defendants from King county superior court. *Affirmed.*

Donworth & Howe (*Crowley & Grosscup*, of counsel), for appellants.

William Martin, for respondent.

SCOTT, C. J. Plaintiff brought this action to recover damages for personal injuries claimed to have been caused by the negligence of the defendants in backing a train upon him. The accident happened about 7 o'clock on the evening of November 15, 1896, while the plaintiff was attempting to cross diagonally the Northern Pacific Railroad track on Railroad avenue, in Seattle, between where Commercial and Jackson streets cross the avenue. The track rested upon piles, and, while attempting to cross it, the plaintiff's foot was caught between the ties, which were not planked over; and before he could get it free the train was backed upon him, causing the injury. The answer denied any negligence on the part of the defendants, pleaded contributory negligence on the part of the plaintiff, and also pleaded a release executed by the plaintiff prior to the commencement of the action, whereby he relinquished all claims for damages. The plaintiff, in his reply, admitted the signing of the release, but alleged that his signature was obtained by fraud, and that before commencing the action he had tendered to the defendants the sum paid as a consideration for the release, which the defendants refused to accept. The trial resulted in a verdict for the plaintiff for the gross sum of $3,185.50, upon which the jury credited $1,185.50 paid by the defendants, prior to the commencement of the action, for the release aforesaid, and rendered a net verdict

Case Stated.

for the sum of $2,000. The defendants have appealed, insisting that there is no evidence of negligence on their part, and, if there was, that the plaintiff was guilty of contributory negligence, and that his action was barred by the release in question.

There was evidence to show that people habitually crossed the track where the plaintiff attempted to, and he had walked over the same place a great many times before. His testimony shows that he considered it somewhat unsafe, and at the particular time he called to a companion, who was preceding him, when they arrived at the trestle, to be careful and not slip. There is also testimony to show that another—safer, but longer—route might have been taken; and we think the evidence would have defeated a recovery, if the injuries had been directly caused by the unsafe condition of the way, and had not arisen from substantially an independent source. The plaintiff could well be held to have assumed all the risks ordinarily incident to making the crossing, but there was proof to show that, at the time he and his companion undertook to cross the track, there were no trains moving in the vicinity, but at the time his foot became fast a train some distance away began backing up towards him; that he called, and his companion called, to the trainmen to stop; that there was no lookout on the rear car, and the train continued backing, and, he being unable to get loose, it ran upon him. We think here was direct proof of an independent fact showing negligence on the part of the defendants, whereby the injury was caused, and the plaintiff ought not to be held to have assumed any such risk in attempting to make the crossing, although he knew that it was unsafe, and that one was in danger of slipping or falling in attempting to cross it, especially in the dark. This disposes of the first two questions urged by the appellants.

Accident at Crossing—When Negligence Independent Cause.

As to the release, it is first contended that a motion for a nonsuit made by the defendants at the close of the plaintiff's case should have been granted, for the reason that the reply admitted the execution of the release, but sought to avoid it on the ground of its having been fraudulently obtained, and that the burden of proof was upon the plaintiff to show that it had been so obtained, and as to which he had offered no proof on his primary case. It appears, however, that, before the plaintiff rested, this matter was submitted to the court by an inquiry

Nonsuit—Order of Proof.

on the part of the plaintiff as to the order in which the proof should be introduced; and the court ruled that the admission in the reply would entitle the defendants to have the release read in evidence without proof of its execution, and that afterwards the plaintiff might show the circumstances under which it was obtained, and the defendants have an opportunity to rebut it. No exception was taken to this ruling by the defendants,—on the contrary, the record fairly shows that they acquiesced therein,—and consequently the point is not now available. Afterwards proof was introduced upon the part of the plaintiff to show that at the time the release was executed he was not in a condition to understand what he was doing. It is unnecessary to set this forth in detail, but there was sufficient offered, if believed by the jury, to avoid the release.

It is further contended that the plaintiff's action should fail because, as a matter of fact, he did not make a tender of the moneys so received prior to commencing his suit, as alleged in his answer, but at all times retained the money in his possession. The plaintiff contends that he was not bound to make such a tender, but was entitled to have the same credited upon the amount that the jury should find he was entitled to recover. The defendants contend that this should not be the rule, for the reason that, if the recovery should be for less than the sum originally paid for the release, the defendants would not be in a position to obtain the excess. But we do not think that we are called upon to consider that question in this case, for there was no prejudicial error, as the recovery exceeded the amount paid for the release, and the defendants were in no wise injured. Affirmed.

Release—Tender.

DUNBAR, REAVIS, and ANDERS, JJ., concur. GORDON, J., was not present at the hearing.

NOTES.

Doctrine Enunciated in Tuff *v.* Warman.—When the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effects and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation.

Notes

England.—Radley *v.* London, etc., R. Co., L. R. 1 App. 759, 2 Thomp. on Neg. 1108; Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, 5 C. B. N. S. 573, 94 E. C. L. 573, 27 L. J. C. P. 322.

Connecticut.—Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Maryland.—Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 28 Am. & Eng. R. Cas. 584.

Missouri.—Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677; Keim *v.* Union R., etc., Co., 90 Mo. 314; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280, 10 Am. & Eng. R. Cas. 780; Werner *v.* Citizen's R. Co., 81 Mo. 374; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Adams *v.* Hannibal, etc., R. Co., 74 Mo. 553, 41 Am. Rep. 333, 7 Am. & Eng. R. Cas. 414.

North Carolina.—Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728.

South Carolina.—*Note* to Freer *v.* Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 669.

Same—As Stated by Missouri Court.—Perhaps the principle of these cases has never been better stated than in a late Missouri case, where it is said: "If the negligence of a defendant which contributed directly to cause the injury occurred after the danger in which the injured party had placed himself by his own negligence, was, or by the exercise of reasonable care might have been, discovered by the defendant in time to have averted the injury, then defendant is liable, however gross the negligence of the injured party may have been in placing himself in such position of danger." Werner *v.* Citizen's R. Co., 81 Mo. 368; *quoted* in Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677.

Same—As Stated by Maryland Court.—"The governing principle established by the courts may now be clearly and concisely expressed in a very few words. If both parties have been negligent, but want of due care and caution on the part of the plaintiff was the direct cause of the injury, or, in other words, if the injury could not have been sustained if the plaintiff had not been careless and neglectful in providing for his safety, there can be no recovery in the action. But if, on the other hand, it is apparent from the evidence that the plaintiff, although negligent, would have suffered no injury had proper care and caution been observed by the defendant, the right of action is maintainable." Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 28 Am. & Eng. R. Cas. 584.

Same—Massachusetts.—The doctrine thus enunciated in Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, when correctly applied, is unobjectionable, but the language used by the court has been the

Notes

subject of some criticism. "We think it is manifest that the rule thus laid down in Tuff *v.* Warman, 2 C. B. N. S. 740, 89 E. C. L. 740, is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery." Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390.

Same—Trespassers.—But it seems that the doctrine of the *Missouri* cases above cited will not be invoked to hold a defendant liable for an injury to a trespasser, unless his danger was actually discovered. Rine *v.* Chicago, etc., R. Co., 88 Mo. 392, 25 Am. & Eng. R. Cas. 545; Keim *v.* Union R., etc., Co., 90 Mo. 314; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 677; Bell *v.* Hannibal, etc., R. Co., 86 Mo. 599. And so it has been held in other jurisdictions. Little Rock, etc., R. Co. *v.* Cavenesse. 48 Ark. 106; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395, 19 Am. & Eng. R. Cas. 108; Burnett *v.* Burlington, etc., R. Co., 16 Neb. 332, 19 Am. & Eng. R. Cas. 25; Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; International, etc., R. Co. *v.* Smith, 62 Tex. 252, 19 Am. & Eng. R. Cas. 21; Central R. Co. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Patterson's Ry. Acc. Law, 192. But these cases may rest on the principle that it is no want of ordinary care not to look out for persons where they have no right to be. Newport News, etc., Co. *v.* Howe, 6 U. S. App. 186. And the trainmen in such cases, even when a trespasser is seen, may usually depend on him to leave the track in time to avoid injury, if he appears to be a person of average capacity. See Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784. But see Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565.

Conversely.—When the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might by ordinary care have discovered the failure of the former to use such care, in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of the injury.

England.—Witherley *v.* Regents' Canal Co., 12 C. B. N. S. 2, 104 E. C. L. 2; Alston *v.* Herring, 11 Exch. 822; Flower *v.* Adam, 2 Taunt. 314.

Alabama.—Gothard *v.* Alabama G. S. R. Co., 67 Ala. 114; Lilley *v.* Fletcher, 81 Ala. 234.

Georgia.—Macon, etc., R. Co. *v.* Winn, 19 Ga. 440.

Notes

Illinois.—Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447, 5 Am. Rep. 57.

Iowa.—Hoehl *v.* Muscatine, 57 Iowa 444.

Maryland.—Irwin *v.* Sprigg, 6 Gill (Md.) 200, 46 Am. Dec. 669.

Missouri.—Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434.

New Jersey.—Dudley *v.* Camden, etc., Ferry Co., 45 N. J. L. 368, 46 Am. Rep. 781, 29 Alb. L. J. 42.

Virginia.—Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. (Va.) 812, 31 Am. Rep. 754.

West Virginia.—Note the language of GREEN, P. J., in Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 10 Am. & Eng. R. Cas. 755.

Where Negligence of Other Party Might Have Been Discovered by Ordinary Care.—And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice; and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of a following injury. Grand Trunk R. Co. *v.* Ives, 144 U. S. 430. And it is well supported by the following cases: O'Keefe *v.* Chicago, etc., R. Co., 32 Iowa 467; Morris *v.* Chicago, etc., R. Co., 45 Iowa 29; Purinton *v.* Maine Cent. R. Co., 78 Me. 569; Northern Cent. R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350; Nelson *v.* Atlantic, etc., R. Co., 68 Mo. 593; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357; Barker *v.* Savage, 45 N. Y. 194, 6 Am. Rep. 66; Brown *v.* Lynn, 31 Pa. St. 510, 72 Am. Dec. 768.

Same—When the Rule Does Not Apply.—But "where the manifestation of the peril and the catastrophe are so close, in point of time, as to leave no room for preventive effort," the rule (as above stated) will not apply. Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565. And see Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595; Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784. See also the following cases; Colorado Cent. R. Co. *v.* Holmes, 5 Colo. 197, 8 Am. & Eng. R. Cas. 410; Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 231; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Price *v.* St. Louis, etc., R. Co., 72 Mo. 414, 3 Am. & Eng.

R. Cas. 377; Texas, etc., R. Co. *v.* Barfield, (Tex. 1887) 3 S. W. Rep. 665.

Concurrent Negligence.—When the negligence of the two parties is concurrent at the time of the injury, it makes no difference that one discovered the negligence of the other before the catastrophe, but too late to prevent it; Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565; Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 196. In such case the negligence of each is proximate, and contributory negligence bars a recovery; Bigelow on Torts, 311, 312; Lucas *v.* New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406; Waite *v.* North Eastern R. Co., El. Bl. & El. 719; 96 E. C. L. 719; Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67; Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390. In considering the case of Murphy *v.* Deane, 101 Mass. 455, 3 Am. Rep. 390, it should be borne in mind that many of its statements are fully applicable only where the rule prevails that the burden of disproving contributory negligence is on the plaintiff. Such is not the English rule.

CHICAGO, R. I. & P. RY. CO.

v.

WILLIAMS.

(*Supreme Court of Kansas, Nov. 5, 1898.*)

Accident at Crossing—Obstructed View—Duty of Traveller.*—It is the duty of a traveller on the highway, when about to cross a railroad, to make a vigilant use of his senses to discover an approaching train; and this duty still rests on him where needless obstructions to the view of the track are negligently permitted by the railroad company to remain on its right of way.

Conflicting Findings—Verdicts.—Special findings of fact returned by a jury are to be given, so far as reasonably may be, that construction which will harmonize with the general verdict; but, where the special findings are in substantial conflict with each other on vital questions in the case, the verdict should be set aside, and a new trial ordered.

(Syllabus by the Court.)

*See notes at end of case.

Chicago, etc., Ry. Co. *v.* Williams

ERROR by defendant from Doniphan county district court. *Reversed.*

M. A. Low and *W. F. Evans*, for plaintiff in error.

A. F. Martin and *Grant W. Harrington*, for defendant in error.

ALLEN, J. John S. Williams was killed by an east-bound freight train on the Chicago, Rock Island & Pacific Railway, in Doniphan county, at a crossing near the village of Denton, on the 11th day of June, 1890. This action is prosecuted by his widow, as administratrix of his estate, to recover damages from the railway company for negligently causing his death. This is the second time the case has been brought to this court. The decision in the first case is reported in 56 Kan. 333, 43 Pac. 246. Somewhat different questions are now presented. Case Stated.

The deceased approached the railroad track from the north. On the west side of the highway, along which he was traveling, there was a hedge, extending, as the jury found, within from 15 to 24 feet of the railroad track. Beyond this hedge was an apple orchard, on the west side of which there was another hedge. The hedge was so high and dense as to effectually cut off all view of the approaching train until the deceased passed beyond the south end of it, when his horses' heads were within a very short distance of the railroad track. Neither the testimony nor the findings of the jury definitely fix the precise point at which the deceased could have seen the approaching train. The right of way of the railroad company was 150 feet wide at the crossing, and the hedge was permitted by the railroad company to remain at such height as to obscure all view of the track to the west of the crossing. Apple trees also were growing on the right of way. The catastrophe happened on the morning of a calm and pleasant day. The deceased was driving his team attached to a lumber wagon, in which there were iron pipes and other things which made more or less noise. The freight train which killed him approached from the west, at the rate of about 25 miles an hour. The negligence charged against the defendant lies in permitting the hedge to grow and remain on the right of way to such height as to cut off all view of an approaching train, and in failing to give the crossing signal 80 rods from the crossing. The defendant charges contributory negligence on the part of the deceased in failing to take due precautions before driving on the track. In answer to

special questions, the jury found that the hedge on the defendant's right of way was from 8 to 15 feet high; that the railroad company was negligent in permitting it to grow to such height and density, and that such negligence contributed directly to the death of Williams; that the defendant did not sound the whistle at the proper place for the crossing; and that it was negligent in failing to do so. The following are the questions and answers deemed most important: "(38) When the horses were within eight feet of the track, could the deceased, by looking from his seat in the wagon, have seen the approach of the defendant's train from a point near the whistling post one-fourth of a mile west of said crossing? Answer: No. (39) If the question last above is answered in the negative, how far could defendant's train have been seen by the deceased from such a position? Answer: About 200 feet." "(41) Was the defendant's road straight at and for at least one-half mile east and west from said crossing? Answer: Yes." "(43) What was there to have prevented the deceased from seeing train approach from the west after reaching a point from 20 to 24 feet north of said track? Answer: Hedge fence and bank of cut at west side of orchard. (44) Was the bell of said engine rung when approaching said crossing? Answer: Yes." "(49) How far west of the crossing was the engine when the fireman first discovered the team? Answer: 150 feet. (50) Was the deceased looking straight ahead while approaching said crossing, before he first saw the engine? Answer: Yes." "(52) Did the deceased look or listen for the approach of the train while approaching said crossing, before the horses got on the track, or before the train was within 50 or 60 feet of the crossing? Answer: Yes. (53) What precaution, if any, did the deceased take on approaching said crossing to avoid the accident? Answer: He looked. (54) Was said Williams looking to the west as he approached said crossing at any time before the train was within 50 or 60 feet of where the accident occurred? Answer: Yes. (55) Was said Williams looking straight ahead when approaching said crossing until the train was first discovered, about 50 or 60 feet west? Answer: He was looking straight ahead until he turned and saw the train." "(57) Did said Williams stop his team on approaching the crossing, and look or listen for an approaching train? Answer: No." "(59) Was there anything to prevent the deceased from hearing the approach of said train at any time before the deceased had reached said crossing after

turning south on the north and south road leading to said crossing? Answer: Yes. (60) State what there was to prevent the deceased from hearing the approach of said train if he had listened? Answer: Deadening of the sound by the presence of the hedge and orchard. (61) What, if anything, did said Williams do to avoid the accident on approaching said crossing? Answer: Tried to whip up and get across. (62) How far was said Williams from the approaching train when he first looked to the west and saw it? Answer: About 150 feet. (63) Did said Williams look to the west for an approaching train as soon as he reached the south end of the hedge fence? Answer: No." A general verdict in favor of the plaintiff for $2,500 was returned, on which judgment was entered.

The serious question presented is whether the facts specially found are sufficient to overturn it. The culpable negligence of the defendant in two important particulars contributing directly to the injury being found by the jury, the only question remaining is whether contributory negligence on the part of Williams precluding a recovery is also found. The rule that a party about to cross a railroad must exercise care and caution commensurate with the dangers of the surroundings, or suffer the consequences of his own rashness, is founded in reason, and has often been declared by this court. Notwithstanding the negligence of the railway company in maintaining an obstruction to the view, it was still incumbent on the deceased to have regard for his own safety, aud to use his senses of sight and hearing to ascertain the approach of a train before attempting to go on the track. As to whether he did so, the special findings, viewed in the light of the testimony, are conflicting and contradictory. There were but two eyewitnesses of the occurrence who testified in the case,—McNulty, who was riding in the wagon with Williams, and Castanien, the fireman on the engine of the train which killed him. According to the testimony of McNulty, the actions of Williams indicated no knowledge on his part of the approach of the train until the horses were on the track, when Williams tightened up his lines, and the collision followed almost instantly. Whether the defendant looked or listened for the approach of the train before that time, McNulty could not state. Castanien, the fireman, testified that, when the train was about 100 or 150 feet from the crossing, he saw the team coming out from behind the hedge; and, as the men in the

Accident at Railroad Crossing—Obstructed View—Duty of Traveler.

wagon came in view, it seemed like they were in conversation; and, as they looked up and saw the train, it seemed like they tried to get across ahead of it,—snapped the lines to get across. The fireman immediately signaled the engineer to stop, and everything possible was done to stop the train, but the collision occurred almost instantly. In answer to the sixty-second question, the jury say that Williams was about 150 feet from the approaching train when he first looked to the west and saw it; and, in answer to the next question, they say that he did not look to the west as soon as he reached the south end of the hedge. The last of these answers would seem based on the testimony of McNulty, and the other on that of the fireman. Assuming that Williams could have seen the approaching train when he was 24 feet from the north rail, the heads of his horses would then be only 12 feet distant from it. If the team was moving at the rate of only 3 miles an hour, and the train at the rate of 24, the horses would pass over the 12 feet in a little less time than the train would move 150 feet,—the distance the jury say the train was away when Williams first saw it. All the evidence shows that the team did not stop, and the jury so found. This being true, under the sixty-second finding, Williams, in order to see the train, 150 feet away, must have looked just as he passed beyond the end of the hedge; but, in answer to the next question, they say pointedly he did not do so. It must be borne in mind that the team did not succeed in crossing the track, but was thrown back on the north side of it. The finding of the jury is that the hedge fence extended "to within 15 to 24 feet of the track." If the hedge concealed the train until the deceased was within 15 feet of the track, the heads of the horses would have been but a step away from it. Why the distance was so indefinitely fixed is not apparent. As to whether the deceased listened as he approached the crossing, the implications of the special findings are to the effect that he did not. But it is exceedingly difficult to say that there was a definite affirmative finding of failure to listen when he should have done so. In answer to the fifty-ninth and sixtieth questions, the jury say that there was the deadening of the sound by the presence of the hedge and orchard, to prevent the deceased from hearing the approach of the train; and, in answering the fifty-third question as to what precaution the deceased took on approaching the crossing, they say he looked. By the next preceding question, and also by the instruction of the court,

the attention of the jury had been directly challenged to the duty resting on Williams to listen as well as to look. They found he did look, but failed to find that he listened.

In view of the rule that special findings are to be so construed as to harmonize with and uphold the general verdict where it can be done, we are unable to say that, taken altogether, the answers returned by the jury in this case amount to a direct finding that the deceased did not listen while approaching the track. We reached this conclusion with some hesitation. Were it not that the jury find that the whistle was not sounded 80 rods from the crossing, and the defendant therefore guilty of neglecting to give the signal required by statute, and one which on a calm, clear morning would probably have been heard notwithstanding the obstructions to sound, there would seem to be little excuse for the deceased to drive on the track as he did without taking greater precaution for his safety. On account of the conflicting findings bearing on the question of the contributory negligence of the deceased, the judgment must be reversed, and the case remanded for a new trial. All the justices concurring.

Conflicting Findings—Verdicts.

NOTE.

Traveler Must Exercise Care Commensurate with Danger.—The traveler, is rigidly required to do all that care and prudence would dictate to avoid injury; and the greater the danger, the greater the care that must be exercised to avoid it. Louisville, etc., R. Co. *v.* Richards, 100 Ala. 365; Beckwith *v.* New York Cent., etc., R. Co., 54 Hun (N. Y.) 446; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627; Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553.

And where, because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary; and, under such circumstances, there can be no excuse for a failure to adopt such reasonable precautions as would probably have prevented the injury.

United States.—Owens *v.* Pennsylvania R. Co., 41 Fed. Rep. 187; Cincinnati, etc., R. Co. *v.* Farra, 66 Fed. Rep. 496; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. Rep. 665.

California.—Pepper *v.* Southern Pac. Co., 105 Cal. 389.

Colorado.—Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30.

Illinois.—Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Louisville, etc., R. Co. *v.*

Note

Patchen, 66 Ill. App. 206; Chicago, etc., R. Co. *v.* Hansen, 166 Ill. 623; Illinois Cent. R. Co. *v.* James, 67 Ill. App. 649; Atchison, etc., R. Co. *v.* Booth, 53 Ill. App. 303; Cleveland, etc., R. Co. *v.* Monks, 52 Ill. App. 627.

Indiana.—Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 380; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405; Reeves *v.* Dubuque, etc., R. Co., 92 Iowa 32; Partlow *v.* Illinois Cent. R. Co., 51 Ill. App. 597, 150 Ill. 321.

Kansas.—Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115; Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 45 Am. St. Rep. 278.

Kentucky.—Gividen *v.* Louisville, etc., R. Co., 17 Ky. L. Rep. 789.

Maryland.—Pennsylvania R. Co. *v.* State, 61 Md. 108, 19 Am. & Eng. R. Cas. 326.

Massachusetts.—Butterfield *v.* Western R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190; Debbins *v.* Old Colony R. Co., 154 Mass. 402.

Michigan.—Shufelt *v.* Flint, etc., R. Co., 96 Mich. 327; Houghton *v.* Chicago, etc., R. Co., 99 Mich. 308; Jensen *v.* Michigan Cent. R. Co., 102 Mich. 176.

Mississippi.—Louisville, etc., R. Co. *v.* French, 69 Miss. 121.

New Jersey.—West Jersey R. Co. *v.* Ewan, 55 N. J. L. 574.

New York.—Nicholson *v.* Erie R. Co., 41 N. Y. 525; Steves *v.* Oswego, etc., R. Co., 18 N. Y. 422; Sheffield *v.* Rochester, etc., R. Co., 21 Barb. (N. Y.) 339; McNamara *v.* New York Cent., etc., R. Co., (Supreme Ct.) 46 N. Y. St. Rep. 439; Whalen *v.* New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. St. Rep. 566; Hermans *v.* New York Cent., etc., R. Co., (Supreme Ct.) 43 N. Y. St. Rep. 900, Foran *v.* New York Cent., etc., R. Co., 64 Hun. (N. Y.) 510. Kilbride *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 177; Lamb *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 579; Vahue *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 452; Manley *v.* New York Cent., etc., R. Co., 18 N. Y. App. Div. 420; Brickell *v.* New York Cent., etc., R. Co., 120 N. Y. 290; Judson *v.* Central Vermont R. Co., 91 Hun (N. Y.) 1; Lortz *v.* New York Cent., etc., R. Co., 83 Hun. (N. Y.) 271; Purdy *v.* New York Cent., etc., R. Co., 87 Hun. (N. Y.) 97; Wilbur *v.* Delaware, etc., R. Co., 85 Hun (N. Y.) 155; Shires *v.* Fonda, etc., R. Co., 80 Hun. (N. Y.) 92; Brown *v.* Rome, etc., R. Co., (Supreme Ct.) 1 N. Y. Supp. 286.

North Carolina.—Tankard *v.* Roanoke R., etc., Co., 117 N. Car. 558; Syme *v.* Richmond, etc., R. Co., 113 N. Car. 558.

Ohio.—Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio Cir. Ct. Rep. 41.

Oregon.—Durbin *v.* Oregon R., etc., Co., 17 Oregon 5, 11 Am. St. Rep. 778.

Pennsylvania.—Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59; Beynon *v.* Pennsylvania R. Co., 168 Pa. St. 642, 3 Pa. Dist. Rep. 308; Hughes *v.* Delaware, etc., Canal Co., 176 Pa. St. 254; Plummer *v.* New York, etc., River R. Co., 168 Pa. St. 62; Urias *v.* Pennsylvania R. Co., 31 W. N. C. (Pa.) 353, 152 Pa. St. 326; Fisher *v.* Monongahela Connecting R. Co., 131 Pa. St. 292, 25 W. N. C. (Pa.) 161; Kraus *v.* Pennsylvania R. Co., 139 Pa. St. 272; Blight *v.* Camden, etc., R. Co., 28 W. N. C. (Pa.) 172, 22 Pittsb. L. J. N. S. 4, 48 Phila. Leg. Int. 362; Philpott *v.* Pennsylvania R. Co., 175 Pa. St. 570; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243.

Texas.—Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660; Missouri Pac. R. Co. *v.* Peay, (Tex. 1892) 20 S. W. Rep. 57.

Virginia.—Nash *v.* Richmond, etc., R. Co., 82 Va. 55; Campbell *v.* Richmond, etc., R. Co., (Va. 1895) 21 S. E. Rep. 480.

Wisconsin.—Rothe *v.* Milwaukee, etc., R. Co., 21 Wis. 256; Heath *v.* Stewart, 90 Wis. 418; Nelson *v.* Duluth, etc., R. Co., 88 Wis. 392; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304.

KRENZER

v.

PITTSBURGH, C., C. & ST. L. RY. CO.

(*Supreme Court of Indiana, Dec. 16, 1898.*)

Injury to Person Asleep on Track—Liability of Railroad.*—Where a person goes to sleep on a railroad track at a crossing, and is run over by an engine, there can be no recovery on account of his injuries, although the trainmen were negligent, at the time of the accident, in running the train at a greater rate of speed than allowed by an ordinance of the city, and in failing to ring the bell or to sound the whistle, unless the trainmen were guilty of wanton or wilful negligence in failing to use ordinary care to avoid injuring him after they saw him upon the track.

Contributory Negligence of Children.*—And such rule applies where the person injured under such circumstances is a boy 7½ years of age, if, "at the time he sat down upon the track, he had sufficient intelligence to know that if he remained on the

*See notes at end of case.

track and an engine or car passed over it, he would be run over and injured," and to know that cars were liable to pass over the track, such knowledge amounting to a full appreciation of the danger of sitting upon the track.

Wanton and Wilful Negligence.—And in an action for injuries sustained under such circumstances, where the jury find that "the engineer was looking out ahead of the engine at and before the time plaintiff was run over," and that plaintiff was not seen by any of the trainmen before the accident, it cannot be held on appeal that the accident was the result of wilfulness or wantonness on the part of the trainmen.

PETITION by plaintiff for rehearing. *Overruled.*

Beckett & Doan, *Christian & Christian*, and *Smith & Korbly*, for appellant.

Sam'l O. Pickens, for appellee.

HOWARD, J. We have given careful consideration to the learned argument of counsel in support of the petition for a rehearing. Nothing said, however, has been sufficient to convince us that the rule heretofore enforced by this court in relation to contributory negligence in injury cases should not be maintained. There is no doubt, and never has been, that, if a person is injured by the act of another, the injured person will thereby have a right of action for damages, even though he was himself not free from fault, provided only the person injuring him knew of his condition, and could, with ordinary care, have avoided the injury complained of. In the recent case of Railway Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365, it was said, citing Railway Co. *v.* Phillips, 112 Ind. 59, 13 N. E. 132: "If the employees see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man." This would be true, although the man had himself been wholly at fault, even so far as to have caused himself to be tied upon the track. So, it is said in Louisville & N. R. Co. *v.* East Tennessee, V. & G. Ry. Co., 9 C. C. A. 314, 60 Fed. 993, cited by appellant: "If, with a knowledge of what the plaintiff has done or is about to do, the defendant can, by ordinary care, avoid the injury likely to result therefrom, and does not, defendant's failure to avoid the injury is the last link in the chain of causes, and is, in law, the sole proximate cause. The plaintiff's conduct is not, then, a cause, but a condition, of the situation with respect to

which the defendant has to act. The principle is established by a long series of cases,"—citing Davies *v.* Mann, 10 Mees. & W. 546, and many other cases. The statement so cited with approval in appellant's brief is quite consistent with the rule established in this state. If, "with knowledge" of the plaintiff's condition, whether that condition has been brought about by plaintiff's fault or not, defendant can, by ordinary care, prevent the threatened injury, he must do so, or become liable for the injury.

We think that the counsel are perhaps right in calling in question the propriety of an attempted distinction made by a *dictum* in Pennsylvania Co. *v.* Sinclair, 65 Ind. 301, between what is there called the English doctrine, illustrated by the case of Davies *v.* Mann, *supra*, and the doctrine accepted in this state. We do not perceive any difference in principle between what are called the two doctrines, however difficult it may be to apply the accepted rules of the law of negligence to particular cases. In every case, one who has himself contributed to his own injury must suffer the consequences of his own want of due care, unless it should appear that the one injuring him knew of his condition in time to have avoided the injury, and could with ordinary care have avoided it. To knowingly injure another, when, with ordinary care, such injury could be avoided, is not, however, mere negligence, but rather willful wrongdoing, or, at least, such a wanton disregard of consequences as amounts to willfulness. In some cases, we readily admit, it may be hard to draw the line between simple negligence on the one side and willfulness or wantonness on the other. Carelessness may be so gross as scarcely to be distinguishable from wantonness, or from a willingness to do any act, no matter what the consequences. But, in principle, the injury suffered, if wrongful, must always be due either to a willingness to do wrong, or to a want of care to avoid such wrong. The act done is either positive or negative in its character; that is, either willful or negligent. Contributory negligence is not a sufficient answer as to willful wrongdoing, but it is as to simple negligence or want of ordinary care.

Injury to Person Asleep on Track —Liability of Railroads.

In the case before us, the injured boy, after playing upon the railroad crossing, sat upon the rail of the track, and there fell asleep, and was hurt by the passing train. It was between 7 and 8 o'clock of a summer evening, though still daylight. The engineer was at the time looking out ahead,

but neither he nor any one else on the train saw the boy. It is not claimed that these facts show any willful injury on the part of the employees of appellee, or any wanton disregard of plaintiff's rights, though it is admitted that the employees were negligent in running the train faster than allowed by ordinance, and without ringing the bell or sounding the whistle. Here, then, is a case where the injured person was himself guilty of negligence contributing to his injury, and where the persons injuring him did not see him, although the engineer was looking out ahead, and did not, of course, know of his condition. Under these circumstances, even accepting the authority of the cases cited by appellant, there could be no recovery. No willful or even wanton injury is shown, and the contributory negligence of appellant is undoubted. In a note to Railroad Co. *v.* Humphreys (Tenn.) 15 Am. & Eng. R. Cas., at page 478, the rule in cases of this kind is, as we think, well stated. It is there said: "The act of falling asleep or being drunk and incapable upon a railroad track is generally held to be such contributory negligence as will preclude recovery in case of accident,"—citing many cases, and adding: "It is, of course, to be understood that, when the servants of the company fail to exercise due care after becoming aware of the plaintiff's dangerous position, the company is liable, notwithstanding plaintiff's contributory negligence." See, further, Railroad Co. *v.* Huffman, 28 Ind. 287; Wright *v.* Brown, 4 Ind. 95; Coal Co. *v.* Shaw, 16 Ind. App. 9, 44 N. E. 676; Railroad Co. *v.* Adams, 43 Ind. 402; Conner *v.* Railroad Co., 146 Ind. 430, 45 N. E. 662; Elliott, R. R. §§ 1251, 1257.

Contributory Negligence of Children.

But it is said that as the injured party in this case was at the time but 7½ years of age, and as a general verdict was returned in his favor, it follows conclusively that all the facts necessary to entitle him to judgment, including the fact as to his having sufficient capacity to comprehend and realize the danger incurred by him in sitting down to play upon the railroad track, were found for him by the jury, unless it should appear from answers to interrogatories that facts specially found were in irreconcilable conflict with such general verdict. There is no question that this is the law. It is, however, shown in the original opinion that such irreconcilable facts as to the capacity of the injured boy were found by the jury. The jury found specially that the boy was 7½ years old; that he was "of usual and ordinary intelligence and judgment for his age," and "of ordi-

nary physical strength and activity for his age"; that he knew "that the track at the place where the accident happened was used to run cars and engines over"; that, just before he was hurt, he was playing jackstones upon the track, and sat "down upon the rail of the track with his feet between the rails," and that, "while sitting there in that position, he fell asleep, and remained asleep until he was hurt"; that, when the engine struck him, he was "lying with one leg over the rail, body off north side of rail"; that "the plaintiff, when he sat down upon the track, had sufficient intelligence to know that the track was used to run cars over," and "that engines and cars were liable to pass over said track"; and that, "at the time he sat down upon the track, he had sufficient intelligence to know that if he remained on the track, and an engine or car passed over it, he would be run over and injured." The capacity of the plaintiff to comprehend the danger thus incurred by him, as so found by the jury, cannot be distinguished from the capacity of an adult in the same circumstances which would make such adult chargeable with contributory negligence. We think it absolutely clear that the negligent conduct of the plaintiff, and his full appreciation of the possible consequences of such conduct, as found by the jury, must make him, as well as any other person, chargeable with negligence contributing to his injury. There is therefore no room here for the application of the rule laid down in Railway Co. *v.* Grames, 136 Ind. 39, 34 N. E. 714, and like cases,—that, where it is uncertain whether the primary facts found show negligence, the jury are permitted and required to find as an ultimate fact whether the plaintiff has or has not exercised such care as an ordinarily prudent person would have exercised under the circumstances. The facts here found by the jury disclose beyond question that the plaintiff was guilty of conduct showing him to be chargeable with negligence contributing to his own injury, and that he was at the time possessed of sufficient intelligence to know and appreciate the danger thus incurred by him.

Neither can it be that the company could be liable under the circumstances as for willful wrongdoing, unless, indeed, those in charge of the train knew that the boy was upon the track. But here, again, the jury find expressly that the engineer was "looking out ahead of the engine at and before the time plaintiff was run over," and also that neither "the engineer nor fireman

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nor any one on the engine saw the plaintiff before he was run over." There was therefore no willful or wanton injury. Indeed, none is charged in the complaint. But, as already said, in order to charge the company with responsibility, there must have been either willfulness or wantonness on its part, or else negligence; and in the latter case the plaintiff must himself have been free from contributory negligence, which, as we have also seen, was not the case. Under any possible view, therefore, the plaintiff could not recover. Petition overruled.

McCABE, J. (dissenting). After a careful and painstaking examination of the questions presented on the petition for a rehearing in this case, I find myself wholly unable to agree with the majority of the court in holding that the petition for a rehearing ought to be overruled. I concur in that part of the original opinion holding that the appellee railroad company was guilty of negligence in running its engine at the time and place it ran over appellant's leg, and inflicted the injuries complained of, and I also concur in the original opinion in holding that appellant, at the time and place, being at and on a highway crossing of the railroad track, was not a trespasser. But I do think this court erred in the original opinion in holding that the appellant was guilty of such contributory negligence as defeated his right of recovery.

The general verdict in favor of appellant is a finding of every material fact averred in his complaint. Among such material averments were the allegations of defendant's negligence, and the plaintiff's freedom from fault or contributory negligence. Railway Co. *v.* Trowbridge, 126 Ind. 391-393, 26 N. E. 64; Rogers *v.* Leyden, 127 Ind. 50–59, 26 N. E. 210; Town of Poseyville *v.* Lewis, 126 Ind. 80, 81, 25 N. E. 593. Now, unless the answers to the interrogatories are in irreconcilable conflict with this general verdict, that plaintiff was free from contributory negligence, the general verdict must stand; that is, if any supposable state of the evidence would or could show that the answers to the interrogatories could be true, and the general finding that appellant was free from contributory negligence was also true, then the general verdict must stand. Railway Co. *v.* Trowbridge, *supra;* Railroad Co. *v.* Adams, 131 Ind. 38–40, 30 N. E. 794; Town of Poseyville *v.* Lewis, *supra*; Rogers *v.* Leyden, *supra*; Western Assur. Co. *v.* Studebaker Bros. Mfg. Co., 124 Ind. 176–179, 23 N. E. 1138; Allemong *v.* Simmons 124 Ind. 199–204, 23 N. E. 768.

There are two principal reasons why, in my opinion, the answers to the interrogatories do not conflict with the finding in the general verdict that the plaintiff was free from contributory negligence. The first of those reasons is that the answers to the interrogatories show that the plaintiff was a boy of only 7 ½ years of age, and fail to show such additional facts as would make him responsible for contributory negligence on account of his acts shown, which would in case of an adult amount to contributory negligence. These answers further show that he was a boy of usual and ordinary intelligence, and of average physical strength and activity for his age; that he knew that the track at the place in question was used to run cars and engines over, and had sufficient intelligence to know that engines and cars were liable to pass over the track, and that if he remained on the track, and an engine or car passed over it, he would be run over and injured; that, just before the injury, he was upon the track at the highway crossing, playing jackstones; that he sat upon the rail of the track with his feet between the rails, and, while so sitting, fell asleep; that, when the engine struck him, he was lying with one leg over the rail, and his body outside; that the time was between 7 and 8 o'clock in the evening of July 12, 1892, it being still daylight. While these facts show that the boy was of usual and ordinary intelligence for one of his age, it does not show what that degree of intelligence was. That was a matter of fact, and not a matter of law, because the law fixes no average or ordinary intelligence to be possessed by all boys of 7 ½ years of age, or any other age. He may have had knowledge that engines and cars were liable to run over the track, and, if they did so while he was on the same, he would be run over and injured. But that is certainly a different thing from the possession of prudence and the power to appreciate and realize the seriousness of the danger he incurred.

In the case of City of Pekin *v.* McMahon 154 Ill., at page 154, 39 N. E. 487, the supreme court of Illinois said: "Whether, as matter of law, a child seven years old or under that age can be justly held to be incapable of negligence, it is not necessary to decide. But where a child has passed the age of seven years, as was the case with appellee's deceased intestate, we are of the opinion that he is bound to use such care as children of his age, capacity, and intelligence are capable of exercising, and that the question whether he has done so or not should be submitted to the jury." The court

cites, in support of the foregoing proposition, authorities to the same effect, as follows: Railway Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899; 2 Thomp. Neg. pp. 1181, 1182; Railroad Co. *v.* Stout, 17 Wall. 657; Birge *v.* Gardner, 19 Conn. 507; Daley *v.* Railroad Co., 26 Conn. 591; Transit Co. *v.* Rourke, 10 Ill. App. 474; Evanisch *v.* Railway Co., 57 Tex. 123; Railway Co. *v.* Fitzsimmons, 22 Kan. 477. The following cases are also to the same effect that the question whether a person of tender years, of seven or eight years of age, has or has not been guilty of contributory negligence by failing to exercise ordinary care, is a question of fact, which must be determined by the jury. Railway Co. *v.* Perriguey, 138 Ind. 414, 34 N. E. 233, and 37 N. E. 976; Mangam *v.* Railroad Co., 38 N. Y. 455; Railroad Co. *v.* Van Steinburg, 17 Mich. 99; Stone *v.* Dock Co., 115 N. Y. 104, 21 N. E. 712; Railway Co. *v.* Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522; Huff *v.* Ames, 16 Neb. 139, 19 N. W. 623; Avey *v.* Railway Co. (Tex. Sup.) 16 S. W. 1015; Schmitz *v.* Railway Co., 119 Mo. 256, 24 S. W. 472; Railway Co. *v.* Rylee, 87 Ga. 491, 13 S. E. 584; Railroad Co. *v.* Young, 81 Ga. 397, 7 S. E. 912; Moynihan *v.* Whidden, 143 Mass. 287, 9 N. E. 645; Rosenberg *v.* Durfee, 87 Cal. 545, 26 Pac. 793; Railway Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034; Pierce *v.* Conners (Colo. Sup.) 37 Pac. 721; McGuire *v.* Railway Co., 37 Fed. 54; Swift *v.* Railroad Co., 123 N. Y. 645, 25 N. E. 378; Baker *v.* Railroad Co., 68 Mich. 90, 35 N. W. 836; Bostwick *v.* Railway Co. (N. D.) 51 N. W. 781; Atwood *v.* Railway Co. (Me.) 40 Atl. 67; Railway Co. *v.* Cooney (Md.) 39 Atl. 859; Adams *v.* Railway Co., 28 C. C. A. 494, 84 Fed. 596; Railroad Co. *v.* Morlay, 30 C. C. A. 6, 86 Fed. 240; Satinsky *v.* Brewing Co. (Pa. Sup.) 40 Atl. 821. As said in the latter case, one for a negligent injury to a boy 7¼ years of age: "When we have considered them all [answers to interrogatories], I do not think the case was one wherein the court should have directed the verdict. It was still left for the jury to say, under proper instructions from the court, whether or not the evidence satisfied them that this lad had such judgment and such comprehension as enabled him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and sense to avoid it. This question, I think, clearly remained for the jury to pass upon."

The jury passed upon the question of the child's negligence in the case now under consideration in their general verdict,

finding, as we must presume from the evidence, that the boy's prudence and discretion, his appreciation and apprehension of danger, were not, in the estimation of the jury, sufficiently matured to enable him to exercise judgment discreetly, so as to subject him to the consequences of negligence. At all events, the answers to the interrogatories fail to show that his acts which endangered him, under all the circumstances of his tender age, discretion, power of reflection, forethought, and judgment, amounted to negligence, and hence such answers are not inconsistent with the general verdict finding him free from contributory negligence. This case, by the authorities above cited (and I know of none to the contrary), belongs to the class of cases where the question of negligence or no negligence becomes a question of fact to be passed on and determined by the jury, and not a conclusion of law to be drawn from the facts found by the jury; because the question whether a child 7½ years of age has sufficient experience, discretion, and judgment, power of forethought and reflection, to enable it to adequately appreciate danger, so as to enable it to exercise caution and prudence in guarding against such danger, is a question upon which one sensible impartial man might infer that such child had sufficiently matured mind and judgment to make it responsible for failure to exercise due care for its own safety, and that due care had not been exercised by it, while another man equally impartial might infer that the child had not sufficient capacity to make it reponsible for failure to exercise such care. In that class of cases, this court, by a long line of decisions, has established that the jury must find whether, under all the facts and circumstances found by them, the party whose acts are in question was guilty of negligence or not, as a question of fact. Railroad Co. *v.* Collarn, 73 Ind. 261; Woolery *v.* Railway Co., 107 Ind. 381, 8 N. E. 226; Smith *v.* Railroad Co., 141 Ind. 92, 40 N. E. 270; Railroad Co. *v.* Harrington, 131 Ind. 426, 30 N. E. 37; Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, and 29 N. E. 775; De Pauw Co. *v.* Stubblefield, 132 Ind. 182, 31 N. E. 796; Faris *v.* Hoberg, 134 Ind. 273, 33 N. E. 1028; Railway Co. *v.* Grames, 136 Ind. 39, 34 N. E. 714; Railway Co. *v.* Moneyhun, 146 Ind. 147, 44 N. E. 1106. The jury, in the answers to interrogatories, wholly fail to find or show, as a question of fact, whether the plaintiff was or was not guilty of contributory negligence. This court, in the original opinion, drew the inference, from the facts shown

by the answers to the interrogatories, that the child had been guilty of contributory negligence, thereby affirming the action of the trial court in drawing such inference. But it was the province of the jury to draw that inference, in the absence of which their general verdict cannot be overthrown by the answers to the interrogatories.

The second reason why the answers to the interrogatories do not conflict with the general verdict as to appellant's freedom from contributory negligence is that, even though the child be held responsible and guilty of negligence in falling asleep upon the railroad track with one leg across the rail, yet that negligence is shown by the findings of the jury to have been antecedent and prior to the established negligence of appellee's engineer. For 300 feet before reaching the child thus sleeping on the track, the engineer had a clear, unobstructed view of the child's situation and peril, and, as the findings show, could, by the exercise of ordinary care, have avoided running his engine over and crushing his leg. That being the case, the plaintiff's negligence was not proximate, and not a proximate cause of his injury, and did not proximately contribute thereto, according to long-established legal principles both in this country and in England. The definition of "contributory negligence" is given in an article on that subject in 4 Am. & Eng. Enc. Law, 17. See same in 7 Am. & Eng. Enc. Law (2d Ed.) pp. 371–382, thus: "Contributory negligence is a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." The same definition is given by Shear. & R. Neg. § 61; Beach, Contrib. Neg. § 7 Whart. Neg. §§ 300, 323. The number of adjudicated cases affirming the same definition is so great that their citation would needlessly extend this opinion. That same article goes on to apply the definition of contributory negligence as follows: "In the application of the principle that the law looks to the proximate, and not the remote, cause of an injury, lies the great difficulty in the law of contributory negligence. No general rule for determining when causes are proximate, and when remote, has been formulated. But the principles that govern the determination of the question are well settled. When it is once established that a person injured by the negligence of another has been guilty of a want of ordinary

care, it becomes necessary to determine whether such want of ordinary care proximately contributed to the injury, as an efficient cause, or only remotely as a condition or remote cause thereof. If it proximately contributed, there can be no recovery; but, if it was only a remote cause or condition of the injury, a recovery can be had. A want of ordinary care may be said to contribute proximately to an injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it. But it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate efficient cause; that is, when the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and * * * the person inflicting the injury discovered the carelessness of the person injured in time to have avoided its effects, and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is held not a juridical cause of his injury, but only a condition of its occurrence." 4 Am. & Eng. Enc. Law, 25–27, and numerous cases there cited. Wharton on Negligence (sections 323–325) states the rule substantially the same, and, at the conclusion of the latter section, uses the following language: "And, no matter how negligent I may have been in putting myself in a particular position, I can recover for injuries inflicted on me by a party who could have avoided injuring me by the exercise of the ordinary care which, as has been just stated, is usual with prudent persons under the circumstances." Shearman & Redfield on Negligence state the rule substantially the same, in sections 61 and 99. To the same effect is Beach, Contrib. Neg. § 34, and cases there cited.

It will be difficult, if not impossible, to find any adjudicated case either in this country or England holding to a contrary doctrine; and the cases affirming the rule as above stated are so numerous that a citation of them would serve no useful purpose. Isbell *v.* Railroad Co., 27 Conn. 393, is one of them. That was a suit by the plaintiff against the defendant to recover damages on account of the railroad company killing the plaintiff's cattle, which he had negligently permitted to stray onto the railroad. It is there said that "the defendants place their defense on the doctrine of the

books that, where a plaintiff seeks to recover for the negligence of a defendant, it must appear that the negligence of the plaintiff did not essentially contribute to the injury,—a doctrine which has long been recognized as a sound one here and elsewhere. * * * But to this general doctrine there are important qualifications, and this case is claimed by the plaintiff to present one of them; or, rather, in this and kindred cases it is said, and we think correctly, that there is an important distinction to be observed, and that great injustice would be done by the indiscriminate application of the rule of law to which we have referred. * * * The plaintiff has not forfeited his cattle because they have strayed away, but may justly demand of the defendants conduct as the circumstances at the moment require, doing no unnecessary injury to his property, and carrying out the spirit of the golden rule, which, applied to a case like the present, is as good law as it is sound morality. * * *" Then the court quotes the celebrated donkey case of Davies *v.* Mann, 10 Mees. & W. 545. The Connecticut court then goes on: "The same is held in Trow *v.* Railroad Co., 24 Vt. 494. The court there say: 'Where the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems now to be settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and diligence, an action will lie for the injury. So, in this case, if the plaintiff were guilty of negligence or even positive wrong, in placing his horse in the highway, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of their train and engine; and, if the injury arose from a want of care, they are liable.'" The same principle was applied in Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593, a case very much like the present. The plaintiff stopped her vehicle in the highway, and the defendant, coming up behind, and attempting to go around, caught the rim of the plaintiff's wheel with the hub of defendant's carriage, and tipped up the plaintiff's carriage, threw her out, and caused the injury sued for. A recovery was upheld on the ground that the contributory negligence was not proximate. Hays *v.* Railroad Co., 70 Tex. 602, 8 S. W. 491, is another case of the same kind. The plaintiff, Hays, negligently got

in front of the defendant's street car, which was being drawn by a mule; but the driver saw him in time to have stopped the car in time to have avoided injuring the plaintiff, but negligently failed to do so, and the plaintiff's foot was crushed. It is there said: "We are also of the opinion that the proposition announced in paragraph 6, and repeated in paragraph 7, of the charge, to the effect that, if the plaintiff was guilty of contributory negligence, he cannot recover, unless the car driver willfully or intentionally inflicted the injury upon him, should not have been given, except upon the theory that the driver failed to discover the plaintiff's peril in time to avoid injuring him, by the use of such means as a prudent and careful man would have employed under the same circumstances; for if the driver could thus have avoided the injury after discovering the plaintiff's peril, his want of ordinary care was the proximate cause of it, and defendant would be liable for damages. The reason why a person who is guilty of contributory negligence contributing to his own injury cannot recover is because the policy of the law will not ordinarily permit one to recover who is himself at fault; but, although the negligence of such person may contribute to his own injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence." The same rule is recognized and enforced in Hurt *v.* Railroad Co., 94 Mo. 255, 7 S. W. 1; Troy *v.* Railroad Co., 99 N. C. 298, 6 S. E. 77; Railroad Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450; Railroad Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78; Baltimore & O. R. Co. *v.* State, 33 Md. 542; Railroad Co. *v.* White, 84 Va. 498, 5 S. E. 573; Deans *v.* Railroad Co., 107 N. C. 686, 12 S. E. 77; McDonald *v.* Railway Co., 86 Tex. 1, 22 S. W. 939; Zemp *v.* Railroad Co., 9 Rich. Law, 84; Kerwhaker *v.* Railroad Co., 3 Ohio St. 172; Northern Cent. Ry. Co. *v.* State, 31 Md. 357; Railroad Co. *v.* Patton, 31 Miss. 156; Adams *v.* Ferry Co., 27 Mo. 95; Northern Cent. Ry. Co. *v.* State, 29 Md. 420; Kline *v.* Railroad Co., 37 Cal. 400; Needham *v.* Railroad Co., *Id.* 409; Davies *v.* Mann, 10 Mees. & W. 545; Dowell *v.* Navigation Co., 5 El. & Bl. 195, 206; Tuff *v.* Warman, 5 C. B. (N. S.) 573; Radley *v.* Railway Co., 1 App. Cas. 754; Scott *v.* Railway Co., 11 Ir. C. L. 377; Coasting Co. *v.* Tol-

son, 139 U. S. 551, 560, 11 Sup. Ct. 653; Railway Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. 679; Austin *v.* Steamboat Co., 43 N. Y. 75; Trow *v.* Railroad Co., 24 Vt. 495; Werner *v.* Railway Co., 81 Mo. 368; Scoville *v.* Railroad Co., *Id.* 434; Welsh *v.* Railroad Co., *Id.* 466; Frick *v.* Railway Co., 75 Mo. 595, 610; Railway Co. *v.* Ryan, 131 Ill. 474, 23 N. E. 385; and many other American and English cases, too numerous to cite. In Baltimore & O. R. Co. *v.* State, *supra*, it is said: "By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding no injury could have occurred if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided that, being on the track, he did nothing positive or negative to contribute to the immediate injury." The illustration in this quotation from the Maryland case is about the aptest of all the illustrations as to what is proximate cause and what is remote cause. The plaintiff's act in the present case in going onto and falling asleep upon the railroad track may have happened a half-dozen times, and yet no injury have occurred, notwithstanding no injury could have happened if he had never done so. Therefore, if negligence it was for him to have done so, it was not a proximate cause of, nor did it proximately contribute to, his injury, but was only a condition or remote cause of such injury. The findings of the jury clearly show that the driver of the engine was in plain view of the appellant in ample time to have avoided the injury by the exercise of ordinary care by stopping the engine. Therefore, under the unbroken current of authority, wherever the English common law prevails, already alluded to above, the appellee's engineer having knowledge of the appellant's antecedent negligence, and his perilous situation caused thereby, before the engineer did the negligent act causing the appellant's injury, that act became the sole proximate cause of appellant's injury, and appellant's antecedent negligence became the remote cause or a mere condition of such injury; that is, after the engineer came in plain view, as he

did, of appellant's antecedent negligence, and peril caused thereby, in time to have avoided the injury in the exercise of ordinary care, then whether appellant was to be injured or not depended, wholly and solely on whether appellee's engine driver exercised such ordinary care; and, as he failed to do so, such failure was the sole proximate cause of appellant's injury, and appellant's act, if negligent, was a mere remote cause or condition of his injury.

From this conclusion there seems, to my mind, absolutely no logical or moral escape, unless the authorities I have cited do not declare the law as it is in this state. It is said that, while these authorities express the law as it is in other courts of last resort, such rule has been expressly rejected, and the contrary rule has been adopted, in this state, by this court. Should that prove to be so, I should respectfully bow to the authority of this court, though not without much regret at finding the court committed to a rule so fraught with injustice. To the claim that this court is committed to a doctrine contrary to the current of authority elsewhere on this subject, I have given much patient, and, as I trust, impartial, consideration; and I have reached the conclusion that no greater mistake could be well made than the supposition that this court is committed to the opposite rule from that for which I contend, and which prevails in other states on the question before us. The principal case supposed to have committed this court to the opposite doctrine is Pennsylvania Co. *v.* Sinclair, 62 Ind. 301. There is language used in that case which, if it had not been, as I think, purely *obiter dictum*, would justify the claim made that it commits this court to the opposite doctrine. But there was no question involved in that case calling for such a remark. The suit was for damages for killing appellee's intestate by a passing train; and the case was decided in this court on the evidence. The evidence showed that the appellant's train was running through the city of Ft. Wayne at a high rate of speed, sufficient to make the company guilty of negligence; and, as it neared the street crossing where deceased was about to cross it gave the usual alarm of bell and whistle; and though it was in broad daylight, about 2 o'clock in the afternoon, the approaching train in plain view and hearing of the decedent, and he being possessed of good eyesight, hearing, and all his faculties, and could, and doubtless did, hear the signals and the noise of the train.yet he paid no attention thereto, and stepped on the track at the street crossing, just immediately

in front of the moving engine. There was no claim made that those in charge of the train had any reason to apprehend that the decedent could not both see and hear, or that he would not use these faculties to prevent him from stepping onto the track in front of the engine, or that the company was liable because it did not stop the train in time to avoid the injury, or that, by the exercise of ordinary care, its servants could have done so. So that there was nothing in the pleading or evidence calling for the *obiter dictum* remark made by the learned justice delivering the opinion. It was as follows: "We are aware that there is a line of decisions establishing what is known as the English doctrine, to the effect that the plaintiff may recover notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him. Radley *v.* Railway Co.,18 Moak Eng. R. 37; Shear. & R. Neg. § 36; Whart. Neg. § 388. But we do not feel justified in disturbing what has been long accepted in this state as the better doctrine, after much discussion and consideration."

It is not, and was not, true that the contrary doctrine had "been long accepted in this state as the better doctrine, after much discussion and consideration." There was not a single case in this court up to that time either expressly or by implication holding that the contrary was the better doctrine; nor is the doctrine known as the English doctrine. Turning to the section of Shearman & Redfield on Negligence cited in support of the assertion that it is known as the English doctrine, I find that it does not state that it is known as the English doctrine; nor is any such statement found in the entire work that I have been able to find. Whart. Neg. § 388, is also cited as authority for the statement. Turning to that section in Wharton, I find it states the doctrine just as it is stated in the other section of Wharton, I have already cited above, and substantially as the other authorities I have cited above, but not a word about it being known as the English doctrine. On the contrary it cites a long list of American decisions holding that doctrine. Among them are the New York court of appeals, New Jersey equity, the supreme court of Pennsylvania, Illinios, Iowa, Missouri, supreme court of the United States, Connecticut, Ohio, Maryland, Wisconsin, Georgia, and other states, and but one English decision. And last, but not least, it cites the supreme court of Indiana, as holding to the doctrine which

the learned judge delivering the opinion we are reviewing denominates the English doctrine, and which he, in substance, stated had been rejected in Indiana after much discussion and consideration for what he calls the better doctrine. The case thus cited by Wharton in support of the section cited in the *dictum* is Railroad Co. *v.* Caldwell, 9 Ind. 397. That was a suit by Caldwell against the railroad company to recover damages for negligently killing his cattle. Caldwell recovered in the trial court, and the company appealed, and sought to defeat the recovery on the ground that Caldwell was guilty of contributory negligence in permitting his cattle to run at large in the vicinity of the railroad. It was held that the common law was in force in this state upon the subject, and required the owner of cattle to keep them inclosed on his own land, in the absence of proof of an order of the board of commissioners of the county permitting them to run at large. So that it was held by this court in that case that the plaintiff was guilty of negligence in so permitting his cattle to run at large. It was there said: "This case, then, will be decided in accordance with the previous rulings of this court in like cases, which are (1) that, where an injury happens to a party proximately through his own wrong, he cannot recover for it; but (2) that, where such injury happens by the proximate wrong of another, he shall be liable for it, even though the remote negligence of the injured party may have contributed to produce it. [Citing Wright *v.* Brown, 4 Ind. 95.] This principle runs through every branch of the law." This court held that, notwithstanding Caldwell's antecedent contributory negligence in suffering his cattle to run at large in the vicinity of the railroad, he had a right to recover for the negligence of the railroad company in killing his cattle, and affirmed the judgment.

This does not look as if this court had at that time accepted as the better doctrine that contributory negligence on the part of the plaintiff would in all cases defeat his action for the defendant's negligence, whether plaintiff's negligence was proximate or not. The case of Wright *v.* Brown, *supra*, cited in Railroad Co. *v.* Caldwell, *supra*, was a case where the owner of a flatboat sued Wright and others, owners of the steamboat Wisconsin, for negligently running too fast and too close to plaintiff's flatboat, laden with a cargo of goods insecurely and carelessly moored to the wharf at Madison, on the Ohio river, by which it was sunk, and with its cargo destroyed. The right of recovery was upheld, not-

withstanding the plaintiff's antecedent negligence in mooring his boat. In passing judgment upon the case, this court there said: "At common law, however, the general principle is that a party cannot recover anything for an injury which his own fault directly contributes to produce. Halderman *v.* Beckwith, 4 McLean,286,Fed. Cas. No. 5,907; Strout *v.* Foster, 1 How. 89. But there is a class of cases establishing this doctrine: That, where the wrongful act immediately causing the injury is the work and through the fault of one party alone, he shall be liable for it, even though the damage such act occasions may be increased or entirely result through some previous neglect of the other party in respect to the thing injured, and especially if the party committing such wrongful act knows, at the time, of the previous neglect of the opposite party." Then the court goes on to quote the celebrated English donkey case of Davies *v.* Mann, 10 Mees. & W. 545, with full approval, and the citation of numerous American cases declaring the same doctrine, winding up in upholding the plaintiff's recovery notwithstanding his antecedent contributory negligence, and affirmed the judgment. But that is not all. In the following cases the question was squarely presented and unequivocally decided by this court, adjudging the law to be as in the other cases cited. Wright *v.* Gaff, 6 Ind. 416–420; Railroad Co. *v.* Hiatt, 17 Ind. 102; Railway Co. *v.* Wright, 22 Ind. 376–382; Neal *v.* Scott, 25 Ind. 440. And the same was directly adjudged to be the law in the Indiana appellate court in Stone Co. *v.* Stewart, 7 Ind. App. 563–566, 567, 34 N. E. 1019; Coal Co. *v.* Shaw (Ind. App.) 44 N. E. 676, 678, 679. This shows that the learned justice delivering the opinion in the Sinclair Case gravely erred in his *obiter dictum* by overlooking the Indiana cases cited above, because at that very time this court had established the exact opposite doctrine to that which he said it had, and which he denominated the better doctrine; and no such doctrine as he denominates the better doctrine had ever up to that time been declared or adjudged by this court to be the law. It has been so often decided by this court that the language used in the opinion is always to be restricted to the case before the court, and is authority only to that extent, and that it is only the points arising in the case and that are decided that are deemed as authority, that I scarcely need cite the decisions. Lucas *v.* Board, 44 Ind. 524. Therefore the *dictum* quoted from the Sinclair Case is no authority whatever. Hence the law as declared in the six

early cases in this court I have quoted from and cited has been the law for 40 years in this state, in harmony with the uniform current of authority elsewhere, unless this court has since either directly or indirectly overruled those cases.

I am told that this court has established a different rule in a later case than any of those to which I have referred, and that case is Evans *v.* Express Co., 122 Ind. 362, 23 N. E. 1039. It is true that was a suit by Evans against the express company for the negligence of the driver of its express wagon in driving the same against Evans while he was standing out in the street, devoted to the use of vehicles and horses. It is true that a recovery was denied in that case in the trial court on the ground of the plaintiff's contributory negligence, which was affirmed in this court. The facts there were that the collision occurred after dark, in one of the streets in Princeton. The plaintiff was standing and talking with two other men, about eight feet from the curb, near the margin of the traveled track over which horses and vehicles were accustomed to pass, there being, however, about 30 feet of space in the street over which horses and wagons might have been driven without coming in contact with the plaintiff. It was not so dark but that persons standing, or a horse and vehicle approaching, on the street, could be seen. The boy driving the express wagon had another boy in the driver's seat with him, and, within about 12 feet of the place where the plaintiff and his friends were standing, observed them. Seeing two of them move out of the way, and his attention being attracted in another direction, he did not afterwards see the plaintiff until the wagon wheel struck and threw him to the ground, inflicting painful injuries on his person. The jury found, in answer to special interrogatories, that the plaintiff was not in the exercise of ordinary care when he was injured. That finding was upheld by the trial court, and by this court on appeal. The driver, though negligent, in failing to see the plaintiff in time, made the negligence of the two persons concurrent, and hence the negligence of each was a proximate cause of the injury. The attempt was made to have this court adjudge that, as the negligence of the plaintiff was antecedent to that of the express driver, the plaintiff's negligence was not proximate, and hence did not proximately contribute to his injury. This court decided the question *thus* presented, and, in doing so, squarely and unequivocally adjudged the law to be as laid down in the six cases cited

above, in 4 Ind., 6 Ind., 9 Ind., 17 Ind., 22 Ind., and 25 Ind., *supra*, in the following language: "We quite agree that, if the driver of the express wagon saw the appellant standing in the street, it was his duty to turn out, and not drive his wagon upon him; and if the facts presented a case in which it appeared that the driver, after seeing the appellant, had any reasonable ground to apprehend that he was not aware of the approaching wagon, and was unconscious of the danger that was imminent, a recovery would have been justified, notwithstanding the antecedent negligence of the appellant. Railway Co. *v.* Long, 112 Ind. 166, 13 N. E. 659; Railway Co. *v.* Pitser, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; Shear. & R. Neg. (4th Ed.) § 61. One whose negligence has contributed to an accident from which he has sustained injury will not be debarred the right to recover if the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary diligence, have prevented the mischief which followed. The ground upon which a plaintiff may recover notwithstanding his own negligence is that the defendant, after becoming aware of the danger to which the plaintiff was exposed, failed to use a proper degree of care to avoid injuring him." But this court held that, because the express driver did not see the plaintiff in time to avoid injuring him, that made the negligence of both parties concurrent or proximate, and the case fall within the general rule that the plaintiff's proximate contributory negligence will defeat a recovery by him. Thus, we find it to be distinctly adjudged to be the law in that case that there may be a recovery by the plaintiff, notwithstanding his own antecedent negligence, if the defendant discovered such antecedent negligence in time to enable him, in the exercise of ordinary care, to avoid injuring the plaintiff, precisely as it had been adjudged 36 years before by this court, in Wright *v.* Brown, *supra*.

As indicating that the court so intended to adjudge in the Evans Case, I turn to the section of Shearman & Redfield on Negligence, involved in the citation quoted, and find the following language used: "Sec. 99. It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to

use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed, although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy." Thus, we see that this court is as thoroughly committed to the doctrine for which I contend as it well can be, notwithstanding the remarks in the Sinclair Case, *supra*. But that is not all. This court has not only not accepted the contrary doctrine at all, but has in many other cases either expressly recognized and upheld the rule laid down in the Indiana cases I have referred to. For instance, that rule is expressly recognized in Railroad Co. *v.* Karns, 13 Ind. 87. And such rule is expressly recognized in Railway Co. *v.* Bryan, 107 Ind., at page 53, 7 N. E. 808, in the following language: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury; or it must appear that the injurious act or omission was by design." The rule was expressly recognized in Pennsylvania Co. *v.* Meyers, 136 Ind., at page 261, 36 N. E. 37, by the use of the identical same language. And the rule has been indirectly recognized by this court and the Indiana appellate court in holding that the plaintiff's contributory negligence cannot defeat his recovery, unless it was a proximate cause of his injury, in the following cases: Korrady *v.* Railway Co., 131 Ind., at page 264, 29 N. E. 1069; Matchett *v.* Railway Co., 132 Ind., at page 341, 31 N. E. 792; Railroad Co. *v.* Krapf, 143 Ind. 665, 666, 36 N. E. 901; Improvement Co *v.* Teter, 1 Ind. App., at page 327, 27 N. E. 635. And these cases, expressly or impliedly holding that the plaintiff's contributory negligence cannot exonerate the defendant's negligence unless the plaintiff's negligence was a proximate cause of his injury, must be construed and understood in the light of the unbroken current of authority as to what is proximate cause, both in this court and elsewhere. That current of authority is perfectly harmonious with the definition of proximate cause already stated above; and I have been wholly unable to find a single case in either of the two courts of last resort in this state asserting a contrary rule, except the *obiter dictum* in the Sinclair Case, *supra*.

But it is said that Railroad Co. *v.* Graham, 95 Ind. 286, holds the contrary rule. But an examination of that case

will demonstrate that that is a grave mistake. There were no facts or pleadings in that case calling for a decision on such a question. It is a plain case of a plaintiff walking on a railroad track in broad daylight, in the same direction that the train was going; and, though the engineer gave the usual signals of warning, the plaintiff, being possessed of good eyesight and hearing, could have both seen and heard the train; yet he heedlessly walked on until the train overtook, struck, and injured him. There were two reasons why the company was adjudged not liable, independently of plaintiff's negligence; and they are that the engineer had a right to presume that the plaintiff would step off the track before struck, and, when the engineer found that he would not, it was impossible to stop the train in time to avoid injuring him. Like the Sinclair Case, there was nothing in the case calling for the determination of the rule I am contending for. In quoting from the Sinclair Case, *supra*, on the subject of the difference between gross negligence and willfulness, the *obiter dictum* in that case already quoted above is also quoted in the Graham Case, *supra;* but there is not a word in the latter case attempting to apply the *dictum* to any part of the case, for there is no point decided in the case to which it is applicable. So, that case furnished no authority for the principle asserted in the *dictum*. I am also told that Railroad Co. *v.* McClaren, 62 Ind. 566, holds the same rule as stated in the *dictum* in the Sinclair Case, *supra*. But that is a serious mistake. That was a case in its facts much like the Graham Case, *supra*, except that it contains no such *dictum* as is quoted in the Graham Case; and, except that, it was conceded by the plaintiff in that case that his contributory negligence would preclude his recovery, unless the facts showed that those in charge of the train ran it against him willfully and purposely. The facts being as they were in the Graham Case, *supra*, it was held that they did not show a willful and intentional killing. But there was no holding either *pro* or *con* as to the rule I am discussing.

I therefore, with profound deference for the opinion of the majority of my brothers, feel deeply impressed with the belief that there is no logical or moral escape from the conclusion that the rule is well established, and has been for over 40 years, in this state, that a plaintiff may recover for a negligent injury, notwithstanding his own antecedent negligence, provided the defendant discovered such antecedent

negligence in time to have avoided injuring the plaintiff by the use of ordinary care, and that such rule, in the language of Shearman & Redfield, is no longer disputed in any court of last resort. I therefore sincerely deplore the departure therefrom, not only because it unsettles a long-established rule, but because the rule commends itself to the dictates of an enlightened sense of justice, and the contrary rule is harsh, unjust, and cruel.

But it is said the answers to the interrogatories show that the engineer did not discover the perilous situation of the sleeping boy on the track until the engine ran onto him, and inflicted the injury, and hence it is claimed the rule I have been discussing has no application to the case. It is true those answers show that neither the engineer nor fireman saw the plaintiff before he was run over and injured by their engine. But the findings of the jury also show that it was daylight, and in a populous city, approaching a crossing, where children were liable to be, and that the sleeping child was in plain view from the engine for a distance of 300 feet before it reached him, and could have been seen by the engineer and fireman if they had looked. It has long been established law in this court that a railroad track is an indication of danger, and, where one attempts to go upon or cross the same, he must listen for signals, notice signs put up as warnings, and look attentively up and down the track, in order to his freedom from negligence. Mann *v.* Stock-Yard Co.,128 Ind. 138, 26 N. E. 819; Hathaway *v.* Railway Co., 46 Ind. 25; Railroad Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138; Smith *v.* Railroad Co., 141 Ind. 92, 40 N. E. 270; Railway Co. *v.* Fraze (Ind. Sup.) 50 N. E. 576. It is also established in this court that such person "is presumed in law to have seen what he could have seen if he had looked attentively, and have heard what he could have heard if he had listened attentively. The reason of this presumption is that it was the travelers' solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train." Railway Co. *v.* Fraze, *supra*; Cones *v.* Railway Co., 114 Ind. 328, 16 N. E. 638. It was no less the solemn duty of the engineer to look attentively as he ran his engine through a populous city, approaching a highway crossing, where children were liable to be. The only difference between the negligence of the defendant and the negligence of the plaintiff is, one is contributory, while the other is original and independent. They are exactly

alike in their essential elements, the same being a failure to exercise ordinary care under all the circumstances. The law imposes the same solemn duty on plaintiff and defendant to exercise due care,—the one to avoid injury to himself, and the other to avoid inflicting such injury. Therefore there is no reason why the one should be presumed in law to have seen or heard what he might have seen or heard had he looked or listened that does not equally apply to the other, where the circumstances are such as to make it his solemn duty to look or listen. So, the defendant is under the same solemn obligation to look or listen where the circumstances require it as the plaintiff is, in order to escape responsibility for negligence. Therefore I think it quite clear that the law presumes that the engineer did see the sleeping child on the track in time to avoid running over it, because he might have seen it had he looked (Railway Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70); and hence his negligence in running over it was the proximate cause of the injury to the boy, and his negligence in going and falling asleep on the track, if negligence it was, was not a proximate cause of such injury, but was a remote cause or a mere condition of such injury.

For these reasons I am of opinion that the answers to the interrogatories are not in conflict with the general verdict, and that we erred in the original opinion in holding that they were, and in affirming and in not reversing the judgment. Hence I am of opinion that a rehearing ought to be granted.

NOTES.

Negligence and Contributory Negligence—Doctrine of Davies v. Mann.—There are two distinct lines of authority, of which Butterfield *v.* Forrester, 11 East 60, heads one, and Davies *v.* Mann, 10 M. & W. 546, the other. In the first case the general rule was laid down, which has never since been denied, that a want of ordinary care on his own part, proximately contributing to his injury, will prevent a person injured by the negligence of another from recovering. In the second case, decided in 1842, the correctness of the doctrine in Butterfield *v.* Forrester was conceded, but it was held that it had no application to the case before the court, on the ground that the plaintiff's want of ordinary care did not constitute contributory negligence, because it was a remote cause or mere condition of the injury, resulting from the defendant's negligence, and did not proximately con-

tribute to it. In other words, the defendant's negligence was held the sole proximate cause of the injury sustained by the plaintiff, the principle being that the negligence of the defendant arising subsequently to that of the plaintiff, and the plaintiff's negligence being so obvious that the defendant could, by the exercise of ordinary care, have discovered it in time to avoid inflicting the injury, the defendant's failure to discover such want of care on the plaintiff's part was itself the negligence proximately and directly causing the injury, with no intervening negligence on the plaintiff's part to break the causal connection between the defendant's negligence and the injury. The following text-writers and cases sustain or apply the rule of Davies *v.* Mann, 10 M. & W. 546, as just stated:

Text Books.—Wharton on Negligence, §§ 323–329; Pollock on Torts, 378, 379; Shearman & Redf. on neg. (4th ed.), §§ 99, 100; Pierce on R. R. 326, 327; Patterson's Ry. Acc. Law, pp. 51–56, and especially § 58, p. 55; Bishop's Non-contract Law, §§ 463, 464.

United States.—In Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, it is said: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in Davies *v.* Mann, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, and cases cited; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156, 66 Am. Dec. 552; Deans *v.* Wilmington, etc., R. Co., 107 N. Car. 686, 22 Am. St. Rep. 902; 2 Thompson on Negligence, 1157; Cooley on Torts (1st ed.) 675." See also Cincinnati St. R. Co. *v.* Whitcomb, 31 U. S. App. 386.

England.—The Bernina, 12 Prob. Div. 58, 57 Am. Rep. 494, 509, note.

Alabama.—Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34.

Connecticut.—Smithwick *v.* Hall, etc, Co., 59 Conn. 261, 21 Am. St. Rep. 104; Isbell *v.* New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 83.

District of Columbia.—Holohan *v.* Washington, etc., R. Co., 18 Wash. L. Rep. (D. C.) 751; Spencer *v.* Baltimore, etc., R. Co., 4 Mackey (D. C.) 138, 54 Am. Rep. 272.

Kansas.—Union Pac. R. Co. *v.* Eddy, 2 Kan. App. 291.

Louisiana.—Factors, etc., Ins. Co. *v.* Werlein, 42 La. Ann. 1046.

Note

Nebraska.—Omaha St. R. Co. *v.* Martin, 48 Neb. 68.

New York.—Scott *v.* Third Ave. R. Co., 59 Hun (N. Y.) 456; Meisch *v.* Rochester Electric R. Co., 72 Hun. (N. Y.) 606; Rooks *v.* Houston, etc., R. Co., 10 N. Y. App. Div. 98; Button *v.* Hudson River R. Co., 18 N. Y. 258; Austin *v.* New Jersey Steamboat Co., 43 N. Y. 82; Sweeney *v.* New York Steam Co., 15 Daly (N. Y.) 312.

North Carolina.—See Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, Clark *v.* Wilmington, etc., Co., 109 N. Car. 449.

Ohio.—Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, 27 Ohio L. J. 383.

Utah.—Hall *v.* Ogden City St. R. Co., 13 Utah 243.

Vermont.—Trow *v.* Vermont Cent. R. Co., 24 Vt. 487, 58 Am. Dec. 196.

So, also, a *dictum* in the case of Davies *v.* Mann may be cited as sustaining the doctrine that contributory negligence is not a defense where an injury is wilfully inflicted. Terre Haute, etc., R. Co. *v.* Graham, 46 Ind. 243.

Some text writers have criticised the rule in Davies *v.* Mann, and have declared the case "a mischief-making authority." Beach on Con. Neg. (2d ed.), §§ 27-30; 2 Thomp. on Neg. 1155. But Mr. Thompson has shown how the rule can be usefully and practically applied—2 Thomp. on Neg. 1157—and there is little prospect of its abandonment by the courts as a safe and proper rule in its practical effects.

Contributory Negligence of Children.—As the standard of care varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law erects for determining what is ordinary care in a person of full age and capacity.

"The question of discretion in the child, and of consequent responsibility for negligence, was not one for the court, and to be determined upon demurrer, but was for the jury. In no class of cases can this practical experience of juries be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence. A court cannot declare, as a matter of law, that a child of seven years is *sui juris*; and when from the age of the child there may be doubt upon that question, it should

be submitted to the jury." Evansich *v.* Gulf, etc., R. Co., 57 Tex. 126, 6 Am. & Eng. R. Cas. 182, 44 Am. Rep. 586. Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; O'Shaughnessy *v.* Suffolk Brewing Co., 145 Mass. 569; Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 46; Brown *v.* Syracuse, 77 Hun (N. Y.) 411; Crawford *v.* Wilson, etc., Mfg. Co., 8 N. Y. Misc. Rep. (Brooklyn City Ct.) 48; Trumbo *v.* City Street Car Co., 89 Va. 780.

Same—Apprehension of Danger.—There can be no recovery if the injury came from a danger fully apprehended by the child, and of which he had assumed the risks, having the capacity to comprehend and avoid danger. Thus, in McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466, 8 Am. & Eng. R. Cas. 135, where the plaintiff claimed a right to recover, on the ground that, being immature and inexperienced, he had been sent by the defendant into danger the full extent of which he did not comprehend, it was said by the court: "The first ground was shown to be untenable by the plaintiff's own evidence. He was past twenty years of age; was not shown to be wanting in average intelligence of those of his age, and his duties were explained to him when he entered upon the employment. He besides understood the very danger into which he fell, and had in mind the purpose to avoid it. It was thus made to appear, by his own examination, that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity or for any other reason, failed to comprehend."

"It is said by the learned counsel for the respondent that infancy and inexperience do not modify the rule of fellow-servants. But that statement only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources. When he has been properly instructed, and knows the dangers of his employment, then he stands on the same footing as any other employee, and cannot recover for any injury caused by the negligence of a fellow-servant." Jones *v.* Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 276. To the same effect are:

Arkansas.—Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.

Indiana.—Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798.

Kentucky.—Givens *v.* Kentucky Cent. R. Co., 12 Ky. L. Rep. 950, 89 Ky. 231.

Massachusetts.—Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Michigan.—Hamilton *v.* Detroit, 2 Detroit Leg. N. 135.

Missouri.—Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

North Carolina.—Meredith *v.* Richmond, etc., R. Co., 108 N. Car. 616.

Tennessee.—McMillan Marble Co. *v.* Black, 89 Tenn. 118.

Washington.—Oregon R., etc., Co. *v.* Egley, 2 Wash. 409, 26 Am. St. Rep. 860.

"Here again it should be observed that the master will not be thus liable if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk." Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 167, 23 Am. & Eng. R. Cas. 418. And so where the minor employee, although not warned of the danger by his master, had obtained knowledge from other sources, and fully realized the risks he was taking. Sullivan *v.* India Mfg. Co., 113 Mass. 396. And see, to the same effect:

Indiana.—Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798.

Massachusetts.—Sullivan *v.* India Mfg. Co., 113 Mass. 396; Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Curran *v.* Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. 457; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Missouri.—Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

WILLIAMS

v.

ATCHISON, T. & S. F. R. CO.

(*Supreme Court of Kansas, July 8, 1898.*)

Accident at Crossing—Contributory Negligence—Question for Jury.*—Plaintiff's decedent was killed at a street crossing, while waiting for a section of defendant's train standing on the other track to pass, by the other section being backed without warning of any kind. The gates were open when he attempted to cross, and the flagman was not at his post. *Held*, that this evidence did not show such contributory negligence as to warrant taking the case from the jury.

ERROR by defendants from Reno county district court. *Reversed.*

*See notes at end of case.

C. M. Williams, for plaintiff in error.
A. A. Hurd and *Stambaugh & Hurd*, for defendants in error.

PER CURIAM. Joseph L. Williams was struck and killed by a car of the Atchison, Topeka & Santa Fe Railroad Company, at a crossing in Hutchinson. He was travelling south on Main street, across which two railroad tracks were laid,—one called the main track, and the other a side, or passing, track. He first reached the side track, upon which a freight train stood, but which had been cut at the Main street crossing. The engine with the greater part of the train was east of the street, and the rear cars of the divided train were on the west side of the street. Williams passed along the street and over the track, but a few feet further south he found a freight train passing over the main track. While standing close to the passing track, waiting for the train on the main track to pass over the street, the front portion of the divided train was backed against him, whereby he was killed. Main street is one of the thoroughfares of the city, and the railroad company maintains and operates gates at this crossing, and keeps a flagman there. According to the testimony, the gates were not closed at the time of the accident; and no flagman was at the crossing, nor were there any of the employees of the company on the rear of the train, or near to it to give signals or notice that the train was backing or about to pass over the crossing. No bells were rung, whistle sounded, or other signals given of the backing of this train. Hattie Williams, the widow, brought this action for the recovery of damages, and, after her testimony was introduced, the court sustained a demurrer thereto, and gave judgment for the defendant.

The testimony certainly tends to show negligence on the part of the railroad company. That the company was negligent was not denied, but it is contended that Williams' death resulted from his own want of ordinary care. If contributory negligence is shown by the plaintiff's own testimony, the court was justified in sustaining the demurrer; but it cannot be done unless the court is able to say, as a matter of law, that contributory negligence was shown. We think the testimony was sufficient to take the case to the jury. While Williams was bound to use care and caution to avoid injury at the crossing, and while he might easily have taken a position between the two tracks where there would have been no danger of collision, there are some circumstances which cannot be overlooked in determining whether he exercised a

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degree of care such as a man of ordinary prudence would have exercised under similar circumstances. It does not appear whether he observed that there was an engine attached to the cars upon the side track, nor that there was any brakeman or other employee on or about the cars which would indicate that they were about to be moved. The train being divided and the street clear was, in effect, a notice to travelers that they might pass over the track. His attention was drawn to the moving train, and he appears to have been looking in that direction when he was struck. The noise of the moving train immediately in front of him might tend to prevent his hearing the movement of the train on the side track, or he might have supposed that the noise of the cars on the passing track were made by the moving cars on the main track. The fact, if it be a fact, that no signals were given, that the gates were open, and no flagman or other employee on or about the train on the passing track, might tend to lull him into a feeling of security, and cause him to assume that there was no purpose of moving the cars on that track. In determining the demurrer, all reasonable inferences that might be drawn from the testimony must be allowed in his favor; and, when the testimony is so considered, it cannot be said as a matter of law that he was guilty of contributory negligence. We have no disposition to relax the rule that a person about to cross a railroad track must make a vigilant use of his senses in order to ascertain whether there is a present danger in crossing. He is bound to recognize that a railroad crossing is a place of danger, and a failure to use due care and caution to avoid injury will bar a recovery. But where the facts, as in this case, are such as to lead different persons to different conclusions in regard to whether the injured person exercised the degree of care which a man of ordinary prudence would have exercised under similar circumstances, they must be submitted to the determination of the jury. The judgment will be reversed, and the cause remanded for a new trial.

NOTES.

Care Required in Backing Cars at Crossing.—Special care to prevent accidents is required of the railroad company where it undertakes to back a train or engine at a highway crossing.

California.—Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Georgia.—Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489.

Notes

Illinois.—Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199, 15 Am. & Eng. R. Cas. 371. See also Chicago, etc., R. Co. *v.* Garvey, 58 Ill. 85.

Indiana.—Lake Shore, etc., R. Co. *v.* Boyts, 16 Ind. App. 640; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25.

Iowa.—Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71.

Kansas.—Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Massachusetts.—Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 564, 57 Am. Dec. 124.

Michigan.—McWilliams *v.* Detroit Cent. Mills Co., 31 Mich. 274; Battishall *v.* Humphreys, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597.

Minnesota.—Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 1 Am. St. Rep. 680, 29 Am. & Eng. R. Cas. 408; Klotz *v.* Winona, etc., R. Co., (Minn. 1897) 71 N. W. Rep. 257.

New York.—Eaton *v.* Erie R. Co., 51 N. Y. 544; Maginnis *v.* New York Cent. R. Co., 52 N. Y. 215; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417.

Tennessee.—Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655.

Texas.—Missouri, etc., R. Co. *v.* Batsell, (Tex. Civ. App. 1896) 34 S. W. Rep. 1047; Gulf, etc., R. Co. *v.* West, (Tex. Civ. App. 1896) 36 S. W. Rep. 101.

Wisconsin.—Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654.

Canada.—Levoy *v.* Midland R. Co., 3 Ont. Rep. 623, 15 Am. & Eng. R. Cas. 478.

Where a train is backing towards a crossing, the fact that a bell was rung does not, as a matter of law, establish reasonable care, and it is for the jury to determine as to whether any other precautions should have been taken under the circumstances. Byrne *v.* New York Cent., etc., R. Co., 104 N. Y. 362, 58 Am. Rep. 512. See also Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377, 13 Am. & Eng. R. Cas. 615.

Special precautions for heedless or venturesome travelers are not required. Smith *v.* Maine Cent. R. Co., 87 Me. 339.

Same—Signals.—The company should provide signals or lights at the end of a car being backed at a crossing, to warn passengers at the crossing of the impending danger. Illinois Cent. R. Co. *v.* Ebert, 74 Ill. 399; Chicago, etc., R. Co. *v.* Goebel, 119 Ill. 515; Chicago, etc., R. Co. *v.* Walsh, 157 Ill. 672; Kissenger *v.* New York, etc., R. Co., 56 N. Y. 538; Barry *v.* New York Cent., etc., R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615, 44 Am. Rep. 377; Bohan *v.* Milwaukee, etc., R. Co., 58 Wis. 30, 15 Am. & Eng. R. Cas. 374.

The fact that the person injured knew that the company was not accustomed to keep a watchman on the rear car has no effect upon

the question of the company's negligence. Galveston, etc., R. Co. *v.* Eitzen, (Tex. Civ. App. 1897) 39 S. W. Rep. 625.

Same—Lookout on Rear Car.—The duty of the company to warn passengers at the crossing is best observed, however, by stationing a brakeman on the end of the rear car, and such a lookout has been required of the company in many instances. Hollinger *v.* Canadian Pac. R. Co., 21 Ont. Rep. 705, 55 Am. & Eng. R. Cas. 192; Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489; Chicago, etc., R. Co. *v.* Garvey, 58 Ill. 85; Lake Shore, etc., R. Co. *v.* Boyts, (Ind. App. 1896) 43 N. E. Rep. 667; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261; Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; Cookson *v.* Pittsburgh, etc., R. Co., 179 Pa. St. 184; Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654; Duame *v.* Chicago, etc., R. Co., 72 Wis. 523, 7 Am. St. Rep. 879, 35 Am. & Eng. R. Cas. 416. See also Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672; Finklestein *v.* New York Cent., etc., R. Co., 41 Hun. (N. Y.) 34.

Where the company was required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train, it was held that it did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track. Levoy *v.* Midland R. Co., 3 Ont. Rep. 623, 15 Am. & Eng. R. Cas. 478.

In Green *v.* Chicago, etc., R. Co., (Mich. 1896) 68 N. W. Rep. 988, it was held that it was a question for the jury whether the railroad company was negligent in not stationing a lookout on the rear car, where the train was backed at a slow rate of speed and in broad daylight and approaching a private crossing.

HOUSTON & T. C. R. CO.

v.

O'NEAL.

(*Supreme Court of Texas, May 9, 1898.*)

Crossing Signals*—Construction of Statute.—In order to comply with the statute providing, in substance, that locomotive whistles shall be blown at the distance of at least eighty rods from public crossings, the whistle must be blown at some point sufficiently near the crossing to be reasonably calculated to give warning to persons about to use the same; such point not to be nearer to such crossing than 80 rods.

*See notes at end of case.

Houston, etc., R. Co. *v.* O'Neal

ERROR by defendant to court of civil appeals of Fourth supreme judicial district. *Reversed.*

Frost, Neblett & Blanding, for plaintiff in error.
Croft & Croft, for defendant in error.

DENMAN, J. O'Neal sued the railroad company to recover damages for injuries alleged to have been negligently inflicted upon him by it in a collision between him and one of its engines at a crossing of the railroad and a public road. The petition charged that the injury was occasioned by the negligence of the company in failing "to ring the bell upon said engine and blow the whistle while coming to said crossing, as required by law to do." From the evidence the jury might have found either that the whistle was not blown, or that it was only blown after it passed a point 80 rods from the crossing, or that it was only blown before it passed such point. The company, by its evidence, sought to establish the last proposition. The court charged the jury that "the law requires that persons running railroad engines shall, when within 80 rods of a public highway crossing of the railroad, blow the whistle and begin to ring the bell on the engine, and continue to ring the bell until the crossing has been passed; and, if the persons in charge of the engine in this case failed to so blow the whistle and ring the bell of said engine, they were guilty of negligence." The court of civil appeals having affirmed the judgment against the company, it has brought the case to this court, complaining that the court of civil appeals erred in holding that said charge was not erroneous.

Rev. St. 1895, art. 4507, provides that "the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road or stopped." In order to comply with this statute, the whistle must be blown for the crossing before passing the point 80 rods distant therefrom. The language, "at the distance of at least eighty rods," is not susceptible of any other construction. The blowing of the whistle after passing such point is not demanded by the letter of the statute, which only requires the continuous ringing of the bell thereafter. The reason for requiring the whistle to be blown before passing that point was to give at least that much warning from an instrument that could be heard a long distance. While

Notes

the statute does not in terms fix the distance from the crossing at which the whistle must be blown, otherwise than to direct that it shall be done before passing such point, its spirit clearly requires it to be blown so near that under all the circumstances it would be reasonably calculated to give warning to persons about to use the crossing. It results that, in order to comply with the statute, the whistle must be blown at some point sufficiently near the crossing to be reasonably calculated to give warning to persons about to use same; such point not to be nearer to such crossing than 80 rods. The charge above quoted was erroneous, in that it construed the statute as requiring the whistle to be blown at some point nearer than 80 rods to the crossing. For this the judgments will be reversed, and the cause remanded. The other errors assigned here are without merit.

NOTES.

Crossings—Signals—Distance at Which to Be Given.—The particular distance from the crossing at which signals should be given, depends upon the provisions of the various statutes. According to the terms of the majority of the statutes in this country and Canada, however, the distance specified is 80 rods from the crossing.

Connecticut.—Bates *v.* New York, etc., R. Co., 60 Conn. 259; Andrews *v.* New York, etc., R. Co., 60 Conn. 293.

Illinois.—Toledo, etc., R. Co. *v.* Furgusson, 42 Ill. 449; Chicago,etc., R. Co. *v.* Dougherty, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292.

Indiana.—Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253.

Kansas.—Missouri Pac. R. Co. *v.* Pierce, 33 Kan. 61, 19 Am. & Eng. R. Cas. 318; Clark *v.* Missouri Pac. R. Co., 35 Kan. 350.

Massachusetts.—Coakley *v.* Boston, etc., R. Co., 159 Mass. 32.

Minnesota.—Kelly *v.* St. Paul, etc., R. Co., 29 Minn. 1.

Missouri.—Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; Kenney *v.* Hannibal, etc., R. Co., 105 Mo. 270; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113; Barr *v.* Hannibal, etc., R. Co., 30 Mo. App. 248.

New Hampshire.—Evans *v.* Concord R. Corp., 66 N. H. 194.

New York.—Cranston *v.* New York Cent., etc., R. Co., (Supreme Ct.) 32 N. Y. St. Rep. 592, 57 Hun (N. Y.) 590, *affirmed* in 125 N. Y. 724, 35 N. Y. St. Rep. 994; Grippen *v.* New York Cent. R. Co., 40 N. Y. 34.

Notes

The New York statute of 1854, requiring railroad companies to signal at eighty rods from grade crossings, has been repealed by the General Repealing Act of 1886. Lewis *v.* New York, etc., R. Co., 123 N. Y. 496, *affirming* 52 Hun (N. Y.) 614, 24 N. Y. St. Rep. 435, 1 Silv. (N. Y.) 393. See also Petrie *v.* New York Cent., etc., R. Co., 66 Hun. (N.Y.) 282.

But there still remains a provision of the Penal Code which declares that engineers failing to signal eighty rods from a crossing shall be guilty of a misdemeanor. Vandewater *v.* New York, etc., R. Co., 135 N. Y. 583, *reversing* 63 Hun (N. Y.) 186.

Rhode Island.—Gardiner *v.* New York, etc., R. Co., 17 R. I. 790.

Texas.—Brown *v.* Griffin, 71 Tex. 654; Gulf, etc., R. Co. *v.* Anderson, 76 Tex. 244, 42 Am. & Eng. R. Cas. 160; Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19.

Utah.—Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129.

Wisconsin.—Cahoon *v.* Chicago, etc., R. Co., 85 Wis. 570.

Canada.—Lett *v.* St. Lawrence, etc., R. Co., 1 Ont. Rep. 545; Rosenberger *v.* Grand Trunk R. Co., 8 Ont. App. 482, 15 Am. & Eng. R. Cas. 448; Hollinger *v.* Canadian Pac. R. Co., 21 Ont. Rep. 705, 55 Am. & Eng. R. Cas. 192.

Train Starting Within Eighty Rods of Crossing.—The requirement of the statute applies in cases where the cars begin to move within the eighty rods, as well as to cases where the point of starting is more than eighty rods distant. Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641, *affirming* 35 Ill. App. 430. But see Central Texas, etc., R. Co. *v.* Nycum (Tex. Civ. App. 1896), 34 S. W. Rep. 460.

Distance—How Ascertained.—The eighty rods from the crossing, at which point the law requires the blowing of the whistle, may be eighty rods in a direct line, instead of the curved line of the track. The purpose of the statute ought not to be sacrificed to its letter. Andrews *v.* New York, etc., R. Co., 60 Conn. 293.

Other Statutory Provisions.—For the provisions of other statutes in regard to the distance from the crossing at which signals must be made, see:

Alabama.—Alabama, G. S. R. Co. *v.* McAlpine, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; Cook *v.* Central R., etc., Co., 67 Ala. 533.

Georgia.—Georgia R. Co. *v.* Cox, 61 Ga. 455; Ga. Code, 1895, § 2222 (400 yards from crossing).

New Jersey.—New York, etc., R. Co. *v.* Leaman, 54 N. J. L. 202. See also Harty *v.* Central R. Co., 42 N. Y. 468 (300 yards from crossing).

South Carolina.—Neely *v.* Charlotte, etc., R. Co., 33 S. Car. 136 (500 yards from crossing.)

Iowa.—In cities in Iowa the whistle is not required to be used, but

the bell must commence to ring sixty rods from the crossing and continue until the crossing is reached. Lapsley *v.* Union Pac. R. Co., 50 Fed. Rep. 172, *affirmed* in 51 Fed. Rep. 174.

Warning Must be Given at Sufficient Distance for Purpose Intended.—In all cases the warning should be given at a sufficient distance from the crossing to be effectual for the purpose intended. Andrews *v.* New York, etc., R. Co., 60 Conn. 293.

Although the statute was not fully complied with, yet if the bell was rung or whistle sounded for such a distance from the place of the accident as fully and fairly to give the deceased timely and sufficient warning that the train was approaching, in time to prevent him from crossing or attempting to cross the track, the company is not necessarily liable. Cook *v.* New York Cent. R. Co., 5 Lans. (N. Y.) 401.

The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by. Whiton *v.* Chicago, etc., R. Co., 2 Biss. (U. S.) 282.

Acts Rendering Signals Unavailing.—It is not a compliance with the statute or the exercise of ordinary care to give signals and at the same time, by careless acts or omissions, such as running trains very close together, to render them unavailing as warnings of danger. Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282.

A company does not discharge its whole duty to the public merely by ringing a bell, where the speed of the train is such as to render the notice thereby given of no avail. Bleyle *v.* New York Cent., etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993.

And hence, where a train approaches a crossing at the rate of thirty miles an hour, the sounding of the whistle three hundred yards from the crossing is not sufficient. Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

BRANCH

v.

INTERNATIONAL & G. N. R. CO.

(*Supreme Court of Texas, Nov. 28, 1898.*)

Unauthorized Use of Hand Car—Liability of Company.—A railroad company is not liable for the negligence of its employee in the operation of a hand car resulting in injury to a person crossing its track

at a public crossing, even though such employee has the control and management of such car, and is in possession thereof by the consent of the company, if at the time of the accident the employee was using the car for his own private use and benefit, and against the instructions of the company.

Same.—Such unauthorized use of the car is not the operation of the road, and the company is not estopped from showing that it was not responsible for such injury.

Custody of Hand Cars—Due Care.—The law does not impose upon a railroad company the duty of "consummate care" in the custody of its hand cars, they not being things dangerous in themselves.

F. J. Maier, for appellant.

S. R. Fisher, for appellee.

DENMAN, J. The court of civil appeals has certified to this court statement and questions as follows:

"This is an action by the appellant, John Branch, against the railway company to recover damages on account of injuries sustained by his wife in a collision with a hand car operated upon appellant's road at a public crossing in the town of New Braunfels, Comal County, Texas. It is averred that the railway company intrusted the use and possession of the hand car to a foreman who was careless and untrustworthy, which fact was known to the defendant, and that it was a part of the duty of the foreman to carefully keep control and possession of said hand car, and that he negligently permitted the same to go upon the track in the nighttime, and that he carelessly and negligently, in the operation of said hand car, caused it to collide with the plaintiff's buggy, in which he and his wife were crossing the track at a public crossing. The facts in the record show that the hand car in question was intrusted to the possession, care, and use of one John Maloney, who used the hand car for the benefit of the company. He at the time was the foreman of a telegraph repair gang for the defendant company. At the time of the accident, which occurred at night at a public street crossing of the railway in the town of New Braunfels, Maloney was propelling and operating the hand car on the railway track under circumstances from which a jury might infer negligence upon his part in running down the buggy in which the plaintiff and his wife were crossing the track, and under circumstances from which a jury might also infer that the

Case Stated.

plaintiff and his wife were not guilty of contributory negligence. The weight of the evidence tends to show that at the time of the accident, when Maloney was so using the hand car, he was doing so contrary to the instructions of the railway company, and for his own private use and benefit; not at the time being engaged in the performance of any duty imposed upon him by the company. There are also facts in the record which have a tendency to show that Maloney was a negligent and untrustworthy servant, and that the railway company had knowledge of this fact, or could have obtained knowledge by the exercise of reasonable diligence, and retained Maloney in its employ. The court below, in the trial of the case, instructed the jury to return a verdict in favor of the defendant. This case has once been before this court, in which the trial court also instructed a verdict for the defendant, which upon appeal was reversed. 40 S. W. 208. In view of this fact, and the importance of the questions raised in the case, we certify the questions propounded to the supreme court; and in this connection we desire to state that, owing to the fact that the supreme court has previously dismissed certificates because questions involving the entire case were certified to that court, we take occasion to say that there is one important question reserved by this court which we do not certify, and upon which we have concluded the court below erred, and for which reason we have concluded to reverse the judgment of the court below. With this preliminary statement, we certify that the above styled and numbered cause is now pending in the court of civil appeals for the Third supreme judicial district; and that there arises from the record the following questions, which we certify to the supreme court of the state of Texas for answer:

"Question 1. In view of a rule of public policy, if there is any applicable, or in view of the duty that a railway company owes to the public in exercising caution in operating its cars over and across public crossings, are such companies relieved from responsibility for the negligent conduct of its servants in the operation of its cars, which may result in injury to one who is without fault in crossing a railway track at a public crossing at a time when the servant has the control and management of the car, and is in possession thereof by the consent of the company, but at the time of the accident the servant is using and propelling the car on the railway track for his own private use and benefit, and was

not at the time performing a service for his master, and so used the car against the instructions of the master?

"Question 2. When a car is intrusted to the management and control of a servant of the company, who is required to use the car on the tracks when performing his duty to the company, the use of which may be attended with danger at public crossings, and the servant operates the car on the track in his own private use and benefit and against the instructions of his master, is not this conduct, in part, the operation of the road, for which the master would be responsible, if the servant was guilty of negligence to the injury of one at a public crossing?

"Question 3. Does the fact that the car was in the possession of the servant, who was charged, as a part of his duty, with the management and control of the same, make the company responsible for the negligence of the servant in operating the car upon the track at a time when the servant was not performing some duty for the master?"

We understand the first question when read in the light of the preceding statement, to be, in effect: The car being intrusted to Maloney by the company, to be kept and used by him in the performance of his duties as foreman of the telegraph repair gang, and he having on the occasion in question, contrary to the instructions of the company, taken the car out on the road, not in the performance of any of such duties, but upon a private errand of his own, and negligently injured plaintiff's wife, is the company liable? Since the question assumes that Maloney was not at the time using the car in the discharge of his duties to the company, and did not have its consent to operate it on the track, it would seem that, upon principle and authority, the nonliability of the company is so well settled that it would serve no useful purpose to attempt to restate the principles upon which the decisions in similar cases have been based; and therefore, in answering the first question in the negative, we content ourselves with referring to some of them: Railway Co. *v.* Cooper, 88 Tex. 607, 32 S. W. 517; Railway Co. *v.* Dawkins, 77 Tex. 229, 13 S. W. 982; Stephenson *v.* Railway Co., 93 Cal. 559, 29 Pac. 234, Cousins *v.* Railway Co., 66 Mo. 572; Robinson *v.* McNeill (Wash.) 51 Pac. 355.

Unauthorized Use of Hand Car—Liability of Company.

We are of opinion that the second question must be answered in the negative. While the law imposes upon a railroad company the duty of operating its road, and requires it

to exercise a certain degree of care in such operation, to prevent injuring persons at public crossings, it does not estop it from showing that a particular act, not done in its service or by its consent, was not in fact a part of its operation of the road. Whether such act be done by one who in other matters is the servant of the company, or by a mere stranger, is wholly immaterial. Whether the company is permitted by law to authorize the operation of its road in whole or in part by another, and, if not, whether it would not be estopped, upon principles of public policy, from denying that the running of the car by Maloney upon the occasion in question was a part of its operation of the road, in case the pleadings and evidence show, as contended by appellant, that Maloney was accustomed to run the car over the track upon private errands, and that the company knew, or by the use of reasonable diligence could have known, thereof, are questions upon which we express no opinion, as they are not included in those certified. For the same reason we express no opinion as to the effect upon defendant's liability of the fact of Maloney's untrustworthiness.

We are of opinion that the third question must be answered in the negative. The rule laid down in Railway Co. *v.* Shields, 47 Ohio St. 389, 24 N. E. 658, so much relied upon in argument, to the effect that the law imposes upon the master the duty of "consummate care" in the custody of things which are dangerous within themselves, such as torpedoes, and that such duty cannot be shifted to another, was not intended by that court, as appears upon the face of its opinion, to have any application to such a machine as a hand car, which is only dangerous by reason of improper use. By reference to the brief of counsel for defendant in error in Railroad Co. *v.* Cooper, 88 Tex. 608, 32 S. W. 517, it will be seen that it was there urged that the fact that the company had intrusted the engine to its servant made it responsible, though the latter's act of scalding plaintiff was not done in the performance of his duties, and that said Ohio case was relied upon as authority. We were then of the same opinion as above expressed in reference to that case.

Custody of Hand Cars—Due Care.

CHICAGO, R. I. & T. RY. CO.

v.

PORTERFIELD *et al.*

(*Supreme Court of Texas, Feb. 9, 1899.*)

Accident at Crossing—Evidence.*—In an action against a railroad company for causing death at a crossing, evidence that it was not unusual for other trains to pass such crossing without giving the statutory signals was not admissible, although one of the grounds of negligence relied on was the failure of the train in question to give such signals.

Harmless Error.—Where a fact was proved by other evidence, and was undisputed, error in the admission of certain evidence in regard thereto was harmless.

ERROR by defendant to court of civil appeals of Second supreme judicial district. *Affirmed.*

T. J. McMurray, for plaintiff in error.
R. E. Carswell, for defendants in error.

BROWN, J. This suit was brought by N. J. Porterfield, wife of W. W. Porterfield, who sued in behalf of herself and her minor children, and by N. Porterfield, the father of the deceased, to recover damages for the death of W. W. Porterfield, alleged to have been caused by the negligence of the railway company at a crossing near the town of Chico, Wise county. One of the grounds of negligence relied upon was that the servants of the railway company operating the train failed to blow the whistle and ring the bell on approaching the crossing at which the accident occurred, as required by law. Over the objection of the defendant, the court permitted J. B. Blanton, a witness for the plaintiffs, to testify as follows: "I have noticed the trains on the Rock Island going north into that cut before this accident, and it is not an uncommon thing for them to pass that whistling post, and not whistle; not uncommon thing for them to pass the post, and whistle after [they] went into the cut." Before the witness Blanton testi-

Accident at Crossing—Evidence.

*See note at end of case.

Note

fied, J. O. Fulghim, for plaintiff, stated, without objection : "I had noticed that train frequently passing those crossings, and not whistling, and the freight trains would do the same way,— go by the whistling post, and not whistle." Other witnesses for the plaintiff, who testified after Blanton, stated, in substance, the same fact. There was no evidence tending to contradict these witnesses upon that point.

The writ of error was granted upon the third assignment of error embraced in the application which is as follows: "The court of civil appeals erred in approving the action of the district court in permitting witness J. B. Blanton to testify as to the custom of other trains whistling passing that post." It was error to admit the testimony objected to, but it is harmless, because the same fact had been proved before objection was made, and by other witnesses afterwards. The evidence is undisputed upon this collateral issue, and, if Blanton's evidence had been excluded, the jury must have found that fact against the defendant. Railway Co. *v.* Gallaher, 79 Tex. 689, 15 S. W. 694 ; Titus *v.* Johnson, 50 Tex. 240. The judgments of the district court and court of civil appeals are therefore affirmed.

Same—Harmless Error.

NOTE.

Signals at Crossings—Evidence of Other Omissions to Give.—Where, in an action to recover damages for the death of a person killed at a crossing, the case is such that it is not competent for the defendant to prove that its servants usually rang the bell at this crossing, and to ask the jury to infer therefrom that it was rung at the time of the accident, so, it is not competent for plaintiff to prove that defendant's servants often omitted to ring the bell at the crossing in question, for the purpose of contradicting a witness whose cross-examination shows that, in testifying that the bell was rung on the occasion in question, he relied largely, although not entirely, on the fact that it was usually rung. Tuttle *v.* Fitchburg R. Co. (Mass.), 45 Am. & Eng. R. Cas. 148.

Where the question is whether those in charge of a railroad train gave a signal of its approach to a public crossing, it is not competent to show that other trains did not give the signal as they approached that place, or that trains did not usually do so. Eskbridge *v.* Cincinnati, N. O. & T. P. R. Co., 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.

MACON & I. S. ELECTRIC ST. RY. CO.

v.

HOLMES.

(*Supreme Court of Georgia, March 23, 1898.*)

Street Railways—Accident at Crossing.—In a suit against a street-railroad company for personal injuries resulting by its car coming in contact with one who was undertaking to cross its track, the plaintiff cannot recover, if, by the exercise of ordinary care, he could have avoided the consequences of defendant's negligence at any time after such negligence had become apparent, or he had reason to apprehend its existence. The following charge of the court, without qualification, was therefore error: "Indeed, the plaintiff could recover, if the injury was inflicted under these circumstances, if his going upon the track had been in the exercise of ordinary care, notwithstanding he may have been himself in some degree of negligence. If his going upon the track was proper, under the evidence, in that it was not contrary to the exercise of ordinary care, and he was injured thereafter, he would be entitled to recover, even though you should believe he was at some fault himself, in failing to avoid the injury."

Same—Comparative Negligence.*—After the plaintiff has become apprised of the existence of defendant's negligence of which he complains, if he could avoid its consequences by the exercise of ordinary diligence, and fails to do so, such negligence on his part will defeat a recovery. It was therefore error for the court to charge the jury as follows: "If he (the plaintiff) was advised of the defendant's negligence, the moment he was so advised, or the moment he had reason to apprehend the defendant's negligence, he was bound from that moment to exercise ordinary diligence to keep from receiving any injury by reason of the negligence of the defendant; and, to the extent he failed to exercise such diligence, he would be negligent. Such negligence would not defeat his recovery, but would lessen it in accordance with what you believe its proportion bore to the defendant's negligence."

Same—Lookouts—Duty of Conductor.—It does not follow, as a matter of law, that it is the duty of a conductor of a street-railroad

Comparative Negligence.—See Southern Ry. Co. *v.* Watson (Ga. 1898), 11 Am. & Eng. R. Cas., N. S., 839, and *note*, 842 *et seq.*

car to observe the track in front of the car, and that portion of a street contiguous to the track on either side. In the absence of any proof showing that he was under any obligation of this kind, it was error for the court to instruct the jury that such was his duty, and a failure in its discharge would be negligence.

Evidence and Verdict.—The evidence not demanding the verdict for the plaintiff, the above errors in the charge of the court, excepted to by the defendant, require the grant of a new trial.

(Syllabus by the Court.)

ERROR by defendant from city court of Macon; J. P. ROSS, JUDGE. *Reversed.*

Dessau, Bartlett & Ellis, for plaintiff in error.

Guerry & Hall, for defendant in error.

LEWIS, J. This was an action for damages on account of personal injuries alleged to have been sustained by the plaintiff by reason of his being struck by a street car of the defendant while he was attempting to cross the track of its railway. Plaintiff's contention was: That as he was approaching, upon a public street in the city of Macon, the track of the street-railroad company, his view was obstructed by some wagons on the street, and near the track, which prevented him from seeing any distance in the direction from which defendant's car was coming. He was partially deaf, and did not hear the running of the car at all. Did not know of its approach until he was struck, just as he was about to leave the track. That the motorman knew of his impaired hearing, and that he was running at a reckless and dangerous rate of speed. That he did not give the alarm by ringing his bell, which plaintiff could have heard. The defendant contended, on the other hand, that it did not observe plaintiff until it was too late to prevent the accident; that the alarm was duly given of the approach of the car, which was running at a moderate rate of speed,—four miles an hour; that it exercised due diligence; and that the accident was unavoidable. It further contended that the moterman was watching out ahead, and that the conductor was engaged inside of the car, and consequently did not observe the plaintiff at all until after he was injured. The plaintiff obtained a verdict for $700, and, defendant's motion for a new trial being overruled, it excepted.

Case Stated.

1, 2. Among the grounds of the motion for a new trial,

error was alleged in the following charge of the court: "If he (the motorman) failed to do those things which ordinary care would have prompted a person in his position, and with his knowledge of the plaintiff, to do, and by reason of his failure to observe those duties the plaintiff was injured without fault on his part, the plaintiff can recover. Indeed, the plaintiff could recover, if the injury was inflicted under these circumstances, if his going upon the track had been in the exercise of ordinary care, notwithstanding he may have been himself in some degree of negligence. If his going upon the track was proper under the evidence, in that it was not contrary to the exercise of ordinary care, and he was injured thereafter, he would be entitled to recover, even though you should believe he was at some fault himself in failing to avoid the injury." Also in charging: "Because the rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger, or has reason to apprehend it. Therefore, if the plaintiff was properly on the track, he is not chargeable with negligence, in failing to avoid the injury from the running of the cars, unless he failed to exercise due diligence to avoid the consequences of the defendant's negligence, if the defendant was guilty of any negligence, after such negligence was known to the plaintiff, or he had reason to apprehend it. You will therefore look to the testimony to see whether the plaintiff, if he was properly upon the track in the beginning, ever had any reason to apprehend his danger; see if he was ever advised of the defendant's negligence, provided you believe the defendant was guilty of any negligence. If he was never advised of the defendant's negligence, or had reason to apprehend it, then he would not be chargeable with any consequences in failing to avoid the result of the defendant's negligence. If he was advised of the defendant's negligence, the moment he was so advised, or the moment he had reason to apprehend the defendant's negligence, he was bound from that moment to exercise ordinary diligence to keep from receiving any injury by reason of the negligence of the defendant; and, to the extent he failed to exercise such diligence, he would be negligent. Such negligence would not defeat his recovery, but would lessen it, in accordance with what you believe its proportion bore to the defendant's negligence." The principle announced in the first

Street Railways —Accident at Crossing.

headnote is too well established, both by the statute and the decisions of this court, to require any elaboration. Some confusion is liable to arise, even in the legal mind on account of the apparent conflict in the two provisions of the civil Code,—one relating to the doctrine of contributory negligence, which does not necessarily defeat a recovery, but reduces the amount which the plaintiff would otherwise be entitled to recover; the other relating to the rule upon the subject of exercising ordinary care to avoid an injury, and declaring a failure in this particular on the part of the plaintiff will entirely defeat a recovery. A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see, and cannot foretell. The rule, therefore, which requires one to exercise ordinary care and diligence to avoid the consequences of another's negligence, necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun, and has become apparent. In the case of Railroad Co. *v.* Attaway, 90 Ga. 661, 16 S. E. 958, it is expressed in this language by the present chief justice: "The rule which requires one to avoid the consequences of another's negligence does not apply until he sees the danger, or has reason to apprehend it." In the case of Railroad Co. *v.* Luckie, 87 Ga. 7, 13 S. E. 105, the same idea is expressed by JUSTICE LUMPKIN in the following language: "It seems to be the clear meaning of our law that the plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could, by ordinary care, after the negligence of the defendant began, or was existing, have avoided the consequences to himself of that negligence." On the other hand, while the facts and circumstances of the case might show that the injured party could not have avoided, by the exercise of due care, the consequence of the wrongdoer's act, yet they may further show that the plaintiff, by his own negligence, contributed to the injury; as, for instance, where one voluntarily places himself in a place of peril, but at the same time there is nothing to put him upon notice of any negligent act of a wrongdoer which really caused the injury. The effect of the contributory negligence of the plaintiff in such a case would not be to defeat, but simply to diminish, a recovery

for the injury sustained. Applying this principle to the charge of the court first above quoted, there was manifest error. Under the instruction of the court, if the plaintiff had been in the exercise of due care up to the time of going upon the track, no amount of negligence on his part thereafter could possibly have defeated a recovery. Of course, there was as much reason for the plaintiff to exercise ordinary care and diligence to avoid the consequences of the defendant's act after he was on the track as there was before he placed himself in this perilous position. In the first portion of the second charge quoted, the law is correctly stated, but in the latter part of the quotation a principle was enunciated directly in conflict with the law; for the court charged the jury, in effect, that the plaintiff, from the time he was apprised of defendant's negligence, or had reason to apprehend it, was bound to exercise ordinary diligence to avoid the consequences of such negligence, "and, to the extent he failed to exercise such diligence, he would be negligent." This was immediately followed by the declaration that such negligence (*i. e.* a failure to exercise ordinary diligence to avoid the injury) would not defeat his recovery, whereas he should have charged exactly the opposite. In the case of Railroad Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105, above cited, it was held by this court that where the judge charged the rule on the subject of exercising ordinary care and diligence, and in the same connection, and without any explanation, charged also the law with reference to contributory negligence, it was reversible error; the error consisting in stating two distinct rules of law in the same connection, and thus qualifying the one by the other, which was not the purpose of the statute. The error in this case is much more palpable; for, while the judge started out to lay down the correct rule of law in the charge excepted to, he ended by stating a rule directly contrary to the provisions of the statute.

Same—Comparative Negligence.

3. The plaintiff in error also excepted to the following charge of the court: "It is the duty of the motorman and conductor of electric street-railway cars to observe the track in front of the cars, and that portion of the street contiguous to the track on the other side, with whatever degree of minuteness and care and concern which you believe a prudent man, with the responsibility of running an electric street car down a street, as the evidence shows you this was, would have exercised; and if the mo-

Same—Lookout—Duty of Conductor.

torman and conductor, or either of them, failed in the discharge of that duty, it would be negligence; and if that negligence caused an injury, by the running of its car upon the plaintiff in the street, the defendant would be liable, unless the plaintiff could have avoided the injury by the exercise of ordinary care on his part." There is no testimony whatever in the record imposing upon the conductor the duty of "observing" the track in front of the cars, "and that portion of the street contiguous to the track on either side." The law not expressly imposing any such obligation, the question as to what the duties of this employee were in this particular was one of fact, and a subject-matter of proof. This charge was open to the objection, not only that it was an expression of an opinion upon the facts, but really an opinion not sustained by any of the testimony. There was no pretense on the part of the defendant company that its conductor on this particular occasion was on the lookout in the direction in which the car was going. On the contrary, the testimony showed that he was engaged inside of the car, and did not observe the plaintiff until after the injury. Hence, under this charge, the conclusion that the defendant was negligent was inevitable, and it was therefore clearly erroneous.

4. Other than as above dealt with, there was no merit in any of the exceptions taken to the rulings or charge of the court. The testimony in this case did not demand a verdict for the plaintiff, and the errors in the charge of the court above set forth required the grant of a new trial. Judgment reversed. All the justices concurring.

Evidence and Verdict.

COX

v.

NORFOLK & C. R. Co.

(*Supreme Court of North Carolina, Dec. 23, 1898.*)

Accident at Crossing—Negligence—Question for Jury.—Deceased was found dead, on a bright moonlight night, on defendant's railroad track, at a point in a town where an habitually used footpath crossed the track, and where the view of approaching trains was

unobstructed. There was evidence tending to show that he had been drinking, but it was admitted that he was killed by a train running backward across the path, and neither sounding the whistle nor ringing the bell. *Held*, that there was more than a scintilla of evidence tending to prove negligence on the part of defendant, and that it should have been submitted to the jury.

Negligence and Contributory Negligence—Burden of Proof.*—In such actions, the burden of proving negligence rests on plaintiff, while the *onus* of showing contributory negligence rests upon defendant.

Same—Question for Jury.—Where there is evidence tending to show negligence on the part of both parties, the case must always be submitted to the jury, and that this evidence appears in plaintiff's testimony is immaterial.

Nonsuit.—In such actions a verdict can never be directed in favor of the party upon whom rests the burden of proof; and, therefore, on a motion for nonsuit, the court can consider only the evidence relating to defendant's negligence; and, if there is more than a scintilla of evidence tending to show such negligence, the motion must be denied, and the case submitted to the jury.

APPEAL by plaintiff from Halifax county superior court. *Reversed.*

W. A. Dunn and *Claude Kitchin*, for appellant.
Thos. N. Hill, *McRae & Day* and *David Bell*, for appellee.

DOUGLAS, J. This is an action brought by the plaintiff, as administrator of N. L. Cox, to recover damages for the negligent killing of his intestate by the defendant's engine. At the close of plaintiff's testimony, the defendant moved to nonsuit the plaintiff, under chapter 109 of the Laws of 1897. This is the act that has already given us so much trouble. It was doubtless intended by the legislature to save time and expense by cutting short an action devoid of merit, but its practical result is the very opposite. It gives the defendant two chances to one for the plaintiff, prolongs litigation, and may cause a palpable miscarriage of justice. As stated in Purnell *v.* Railroad Co., 122 N. C. 832, 835, 29 S. E. 953: "Before this statute, the defendant might make this motion; but if the court refused it, and the defendant offered further evidence, he lost the benefit of that motion.

Case Stated.

*As to Burden of Proving Contributory Negligence, see 7 Am. & Eng. Enc. Law (2nd Ed.) 453 *et seq.*

The motion could be renewed at the close of the evidence in the case, but would then depend upon the whole evidence," —citing Sugg *v.* Watson, 101 N. C. 188, 7 S. E. 709. Now, however, the defendant, if his motion is overruled, can file his exception, and proceed with the case. In passing upon that exception, we would be compelled to ignore all the subsequent proceedings, including the additional evidence, the verdict, and the judgment. If we sustained the exception, the plaintiff must be nonsuited, even if the subsequent evidence of the defendant himself should show the plaintiff clearly entitled to recovery. If we overruled the exception, we must then proceed to review the case upon its merits. Thus, there would be practically two appeals, in one of which we might be compelled to nonsuit a plaintiff who had obtained a just judgment. We do not intend to criticise the legislature, but simply to call attention to the fact that the law in practical operation does not meet the public purposes of its enactment. While doing so, we still deem it our duty to enforce it.

The case as now before us presents the single question whether there was sufficient evidence to go to the jury as to the negligence of the defendant. The plaintiff's evidence must, for the present purpose, be accepted as true, and construed in the light most favorable for him. Avera *v.* Sexton, 35 N. C. 247; Hathaway *v.* Hinton, 46 N. C. 243; State *v.* Allen, 48 N. C. 257; Abernathy *v.* Stowe, 92 N. C. 213; Gibbs *v.* Lyon, 95 N. C. 146; Springs *v.* Schenck, 99 N. C. 551, 6 S. E. 405; Hodges *v.* Railroad Co., 120 N. C. 555, 27 S. E. 128; Collins *v.* Swanson, 121 N. C. 67, 28 S. E. 65; Cable *v.* Railroad Co., 122 N. C. 892, 29 S. E. 377; Whitley *v.* Railroad Co., 122 N. C. 987, 29 S. E. 783; Railway Co. *v.* Lowell, 151 U. S. 209, 14 Sup. Ct. 281. It is well settled that, if there is more than a mere scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence. State *v.* Shule, 32 N. C. 153; State *v.* Allen, 48 N. C. 257; Wittkowsky *v.* Wasson, 71 N. C. 451; Spruill *v.* Insurance Co., 120 N. C. 141, 27 S. E. 39; Hardison *v.* Railroad Co., 120 N. C. 492, 26 S. E. 630; Anniston Nat. Bank *v.* School Committee of Durham, 121 N. C. 107, 28 S. E. 134; White *v.* Railroad Co., 121 N. C. 484, 27 S. E. 1002; Collins *v.* Swanson, *supra*; Eller *v.* Church, 121 N. C. 269, 28 S. E. 364; Cable *v.* Railroad Co., *supra*.

Applying these principles, we find the following evidence, which we think is certainly more than a scintilla, and which

should have been submitted to the jury as tending to prove the negligence of the defendant. No one saw the killing, nor does it appear how long the deceased had been killed when found. Thomas Griffin testified: "That between 12 and 1 o'clock he found some one dead on the railroad [proved to be deceased]. He was lying across the track, with one hand cut off on one side, and one foot on the other. * * * Saw a train pass that night about two hours before I saw Cox. I was about 200 hundred yards from it, I guess. The train was running backward when I saw it. It made no stop. At the time when I saw the train, it was on the Norfolk & Carolina Railroad. It was on the Y the last time. Heard no bell or whistle. The moon was shining bright." James Sills testified that "Tom reported to Massey, the night operator, that he had found a dead body on the road. We went and examined, and found it was Cox. He was lying cater-cornered across the railroad, one side of his face torn, his skull crushed, one of his hands cut off. His hat was lying on the right-hand side of the switch, and his foot was lying crushed off, and one of his legs was broken. The roads run pretty near together up there. The switch goes from the Norfolk & Carolina to the Wilmington & Weldon. There is a public footpath there. It was the old county road. It goes right by my store from the main road across the W. & W. Railroad. It goes out into the main road. Most people traveling afoot go on that road. Cox could not go out of town anyway without crossing a railroad. This was the usual path to his house,—the path he always walked. No obstructions nor anything from the railroad in the way of the path. A person could easily be seen that night on the railroad near the path from the depot. It was a moonlight night,—a bright, moonlight night. Heard no noise, signals, nor anything of that kind. Heard no bell or whistle." P. E. Smith, admitted to be an expert engineer, testified: "It was 250 feet from the depot to where he was found. This was about 10 feet from path. That there was no obstruction between depot and point opposite depot to this road and path. There is a small cut in road, right opposite depot, but after that it is level all the way. Small tree between house and railroad; 24 feet from center of road to center of tree. House and tree would not interfere with view from train if any one was moving along the track by this switch. If I were looking out for a man, I could see

him 100 yards ahead of me, on a bright, moonlight night. If a man was keeping a lookout, he could see a man on the track for 100 yards." The witness was asked: "Would the manner in which this road was curved around prevent you from seeing him?" The witness answered: "There is no obstruction in the view because the man is on a level. You can look across the track. Yon cannot look straight down, but you can look across." On the redirect examination, he stated that, "if the train were moving at a speed of 3 or 4 miles an hour, it could have been stopped in 15 feet; if 8 miles an hour, in double that distance." The plaintiff testified that the deceased was his brother, and he got some gentlemen on Monday night, and went out there, and "took a hand off my farm, about the size of my brother. Made him lie on the track. Went to about even with course of warehouse, and could see him while standing up. He lay down, and I could see him. The night was moonlight, and a little cloudy. * * * The path was the old road at one time before the town was laid off into streets, and had been used by foot passengers ever since." R. M. Quidly testified that "he was in Hopgood that night. It was a clear, moonlight night. I saw train about 10 o'clock pass. Heard neither signal nor bell. I was about 100 yards from the track." There was also testimony tending to show the deceased had been drinking.

Taking this evidence in the light most favorable to the plaintiff, we find a train running backward in a town at night, and neither sounding the whistle nor ringing the bell, although passing over a track on the old county road which has ever since been habitually used as a footpath. It is admitted that the deceased was killed by the train, which would be the natural inference from the evidence. This is certainly more than a scintilla of evidence tending to prove the negligence of the defendant, which should have been submitted to the jury. There was error in directing a nonsuit.

Accident at Crossing—Negligence—Question for Jury.

Had the question not been again presented by counsel, it would almost seem needless to repeat what we have so often said,—that the burden of proving negligence rests upon the plaintiff, while the *onus* of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necess-

Negligence and Contributory Negligence—Burden of Proof.

arily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant, the defendant the contributory negligence of the plaintiff, and, again, for the plaintiff to show the last clear chance of the defendant if that issue becomes material. Each of these issues depends upon the one preceding. The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it, that is an end of the case, and the defendant is not then required to prove contributory negligence. Properly speaking, there can be no contributory negligence unless there is negligence on the part of the defendant. 7 Am. & Eng. Enc. Law (2d Ed.), 373. This distinction is important as affecting the burden of proof and the consequent direction of a verdict. If the negligence by which the plaintiff is injured is entirely his own,—as in Mesic's Case (N. C.) 26 S. E. 633, where, instead of the train running into the horse, the horse ran into the train,—then there is no evidence to go to the jury on the first issue, and the question of contributory negligence becomes immaterial. Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. Under exceptional circumstances, not now before us, it may say that, if the jury believe the evidence, they will answer the issue "Yes," for that is equivalent to charging the law upon a given state of facts, leaving entirely to the jury the credibility of the witnesses. Even then, if there is any conflict of testimony, the verdict is vitiated.

Same—Question for Jury.

It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in Spruill v. Insurance Co., 120 N. C. 141, 27 S. E. 39, it did not have its origin in that case, but in Wittkowsky v. Wasson, 71 N. C. 451, where the doctrine was distinctly laid down in the

Nonsuit.

following words, quoted from the opinion of WELLES, J., in the court of exchequer chamber: "There is in every case a preliminary question which is one of law, *viz.* whether there is any evidence on which the jury could properly find the question for the party on whom the burden of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant." In other words, the verdict must in either event be directed against the party on whom lies the *onus*, and, by necessary implication, can never be directed in his favor. In Spruill *v.* Insurance Co., 120 N. C., on page 147, 27 S. E. 41, this court has said: "That where there is no evidence, or a mere scintilla of evidence [or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue], the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests." The words in brackets have been cited as authorizing the court below to pass upon the entire evidence and direct a general verdict in favor of the defendant upon the contributory negligence of the plaintiff. That opinion will bear no such construction, as the burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. Hardison *v.* Railroad Co., 120 N. C. 492, 26 S. E. 630; Collins *v.* Swanson, *supra*; Anniston Nat. Bank *v.* School Committee of Durham, 121 N. C. 107, 28 S. E. 134; Eller *v.* Church, *supra*; Caldwell *v.* Wilson, 121 N. C. 425, 28 S. E. 363; White *v.* Railroad Co., 121 N. C. 484, 27 S. E. 1002; Everett *v.* Receivers, 121 N. C. 519, 27 S. E. 991; Cable *v.* Railroad Co., 122 N. C. 892, 29 S. E. 377; Johnson *v.* Railroad Co., 122 N. C. 955, 29 S. E. 784; Whitley *v.* Railroad Co., 122 N. C. 987, 29 S. E. 783. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33 of the Laws of 1887. The same rule prevails in the federal courts. Railroad Co. *v.* Gladmon, 15 Wall. 401; Coasting Co. *v.* Tolson, 139 U. S. 551, 11 Sup. Ct. 653. It therefore follows that, on a motion for nonsuit, the court can consider only the evidence relating to the negligence of the defendant; and,

if there is more than a scintilla tending to prove such negligence, the motion must be denied, and the case submitted to the jury.

We have discussed this question fully, because the learned counsel for the defendant contended that the judgment of nonsuit should be affirmed, on the ground of the contributory negligence of the plaintiff. To this doctrine, so ably presented and elaborately discussed, we are permitted to assent neither by the current of our decisions nor the policy of our laws. The judgment of nonsuit is reversed, and a new trial ordered. New trial.

FAIRCLOTH, C. J., dissents.

MISSOURI PAC. RY. CO.

v.

MOFFATT *et al.*

(*Supreme Court of Kansas, Jan. 7, 1899.*)

Negligence — Pleading — Limitations — Amendments. — A petition alleging negligence in general terms may be amended so as to set forth definitely of what such negligence consisted, although the statutory period of limitation for the bringing of such an action has expired when the amendment is made.

Action by Next Friend—Parties—Procedure.—Proceedings in revivor are not necessary in substituting a new next friend for one who had previously acted in behalf of an infant.

Accident at Crossing—Evidence.—The fact that a man killed on a railroad crossing was careful and sober, and had previously exercised due care in passing over the same crossing, tends to repel any inference of negligence arising from the mere fact that he went upon the track when a train was approaching.

Death by Wrongful Act—Damages.*—In an action by the next of kin to recover damages for death caused by the wrongful act of the defendant, it is not essential to a recovery that any witness shall have testified to the pecuniary value of the deceased's services, or the profits which he derived from his business, but ordinarily a sufficient basis for an award of damages may be found in the char-

*See notes at end of case.

acter, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin.

Special Verdicts—Harmless Error.—The action of the court in permitting the withdrawal by plaintiffs of a list of special questions of fact after the same had been submitted to the jury will not be deemed prejudicial error, where it does not appear that the special questions which were submitted in behalf of the defendant were framed with reference to those asked by the plaintiffs and allowed to be withdrawn, or that the defendant was in some way prejudicially affected by the withdrawal.

Case at Bar.—The evidence examined, and *held* to be sufficient to sustain the verdict and findings.

(Syllabus by the Court.)

ERROR by defendant from Wyandotte county district court. *Affirmed.*

Waggener, Horton & Orr, for plaintiff in error.

Hale & Fife, J. F. Mister, and *Hutchings & Keplinger*, for defendants in error.

JOHNSTON, J. This is the second time that we have been called upon to review the proceedings in the trial court in this case. Railway Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607. On the first review it was held that the averments of the petition were not sufficiently specific to justify the admission of proof of the negligence of the company beyond its failure to give proper signals and due warning of the approach of its trains; and, because the trial court admitted testimony and submitted grounds of negligence to the jury not definitely pleaded, the case, for that and for other reasons, was remanded for a new trial. After it was so remanded the plaintiffs below amended their petition, by alleging that the railway company was negligent in failing to give signals other than those required by the statute, and in failing to have a gate, a flagman, or an electric alarm, at the highway crossing where Andrew C. Moffatt was struck and killed by a locomotive attached to one of its passenger trains. Several years intervened between the filing of the original petition and the amendment, and it is now claimed that the court was not warranted in permitting the plaintiffs to set up the additional grounds of negligence. The company assumes that a new cause of action is stated in the amended pleading, and it is contended that as to such new

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cause of action it must be deemed to have been commenced when the amendment was made, and not when the action itself was commenced, and therefore that it was barred. This contention cannot be successfully maintained.

Negligence—Pleading—Limitations—Amendments.

No new cause of action was set forth in the amended petition. The cause of action set forth in each of the pleadings was the negligent killing of Andrew C. Moffatt. In the original petition it is alleged that on the morning in question the company ran its engine and cars at a high rate of speed over a dangerous crossing without giving any warning of the approach of the train, and without using the bell or blowing the whistle, "and without using any other lawful, safe, and prudent methods of notifying the public or said Andrew C. Moffatt of the approach of said engine and cars," etc. It will be observed that the only negligence specifically alleged was the failure to blow the whistle and ring the bell, and for that reason the petition was held to be defective. The pleading did set forth, in a somewhat indefinite way, that the company failed to take other precautions which it should have taken, and which might have averted the injury. The amended petition set forth definitely that which had been pleaded generally in the original petition, and therefore it cannot be said that a new cause of action or a new ground of recovery was introduced.

The next exception was to the allowance of a new next friend to appear for the three infant plaintiffs. It appears that after the first trial Eliza M. Moffatt, who acted as the next friend for three of the minor children, died, and when the last amended petition was filed Charles Moffatt, who in the meantime had reached majority, was named as the next friend of Wilbur and Florence Moffatt. It is contended that by the death of Eliza M. Moffatt the action became dormant as to the infant plaintiffs, and that another next friend could be substituted only by proceedings in revivor, and that as there had been no revivor the action was abated. While the action of an infant under the statute may be brought by his guardian or next friend, the infant is the real party of the proceeding. The infants were parties to the proceeding from its inception, and their rights which were involved in the action belonged to themselves. The next friend had no title to or right in the subject-matter of the action, but was merely brought into court to protect the rights of the infant. The court in which

Action by Next Friend—Parties—Procedure.

the proceeding is pending guards the interests of the minors, and in the exercise of its power may, when it becomes necessary, remove one next friend and appoint another. It is also true that, when the infant arrives at majority during the pendency of the suit, that fact may be entered upon the record, and he may thenceforward proceed in the suit alone. No formal proceedings to revive are necessary, as the next friend is neither technically nor substantially a party to the action, but only appears as an agency of the court to guard and protect the interests of the minors, who are the real parties to the proceeding. The statute with reference to the revivor of proceedings has no application to cases where there is a change of next friend, and hence there was no abatement of the action.

We are unable to agree with the claim that the evidence and special findings of the jury show contributory negligence on the part of Moffatt. The negligence of the railway company was sufficiently shown. The injury was carelessly inflicted, on a foggy morning, and at a dangerous crossing, when and where extraordinary precautions should have been taken by the traveler as well as the trainmen. It was shown and found that Moffatt was familiar with the crossing, and appreciated the danger of passing over it; that on previous occasions, and when his son accompanied him, before attempting to make the crossing he required his son to get out of the buggy and go forward to the track to ascertain if a train was approaching; that he was alone when the accident occurred, and that he then knew and appreciated the danger of attempting to make the crossing without taking the same precautions he had previously taken when his son was with him. The testimony as to the care exercised by Moffatt in approaching the track is very meager, but there is no affirmative testimony nor any finding of a want of care on his part. There were only two eyewitnesses of the collision,—the engineer and fireman on the train which struck Moffatt,—and on account of the fog he was only discovered a moment before he was struck. They stated that the team was upon the track, and that he appeared to check them, and in the statement which he made before he died Moffatt stated that he did not discover the train until he was upon the track, and that the team would neither go forward nor backward. The train was travelling from 30 to 32 miles an hour, and it is evident that there was not sufficient time for him to have gotten out of the way after he saw the

Accident at Crossing—Evidence.

train or after the trainmen had discovered him. One of them states that he was not seen until the train was within 40 feet of the crossing, and the other that he was not seen until the train was within 50 to 120 feet from the crossing. Whether he stopped and listened for the train, or whether he left his team and went forward to look for the train upon his approach to the crossing, is not shown, nor does anything appear to indicate that he failed to take reasonable precautions for his safety. We cannot assume that he was guilty of contributory negligence. Aside from the instinct of self-preservation, there is proof that he was a sober, careful man, and had previously exercised due care for his safety on approaching the same crossing. Who can say that he did not stop, look, and listen before going upon the crossing, or that he failed to exercise that degree of care which the conditions and circumstances required? He was a middle-aged man, with good health, and the instinct of self-preservation strong within him, sober, and exceedingly careful, and these facts and circumstances are not without weight in repelling any inference of negligence that might arise from the mere fact that he was upon the track and was struck by the locomotive. The plaintiffs are not required to show the absence of negligence, but before it can avoid the consequences of its negligence the company must show that Moffatt's injury and death were due to his own negligence. The claimed mismanagement of the team is of but little importance, since it is clear from the testimony that there was not sufficient time for him to have gotten the team off the track after the peril was discovered. The general verdict in effect finds that he was not negligent, and we discover nothing in the special findings inconsistent with the general verdict.

It is next contended that the evidence in the case did not afford a basis for the award of substantial damages. It was shown that at the time of the accident Moffatt was 51 years old, in good health, and that he supported a family of six children, four of whom were girls. One of the children, only, assisted in the support of the family. It is further shown that during the last years of his life he had been engaged in painting and calcimining, and also in the wall-paper and piano business. At the same time he was carrying on a farm near Kansas City. The testimony is that he was sober and industrious, but there is nothing in the testimony to show the amount of the earnings or profits which he

Death by Wrongful Act—Damages.

derived from his labor and business. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries. It is difficult to show direct and specific pecuniary loss which the next of kin suffer from the death, as the real value of a life is problematical and speculative to a certain extent. No fixed rule of measurement can be laid down, and much is necessarily left to the judgment and discretion of the jury. In estimating the damages the jury should take the facts proved, in connection with the knowledge and experience possessed by them in common with men in general, to determine the pecuniary value of the life taken. Mathematical accuracy in measuring the pecuniary loss suffered is not praticable, and in general it may be said that the basis for the allowance of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin. The court is of the opinion that, with the elements thus furnished, the jury may make a fair estimate of the damages that are recoverable. The writer is inclined to the view that the evidence is not sufficient as a basis on which to compute pecuniary loss. No evidence was given as to the amount which Moffatt earned or had earned, nor as to the amount of pecuniary aid or benefit which it would have been possible for him to give to his children in the future. The jury may very well consider his character and condition, and his capacity for earning money and his expectancy of life, but some evidence should certainly be given of the profits of labor of the deceased, and what in all probability he might earn for the future support of his wife and children. While much must be left to the discretion and judgment of the jury, it is not unlimited; they must be guided by the fixed rules of law, and they cannot award substantial damages without proof of the extent and character of the pecuniary loss suffered. What his income was, what it had been, how much he was capable of earning, how much he had been in the habit of contributing to his children, and how much he would be able to contribute in the future, were facts which could have been easily proven, and which would have afforded a basis for the verdict rendered. No evidence of this kind was offered, and not even the expectancy of life was shown. In the absence of proof, the jury were left to guess at or speculate upon the pecuniary value of Moffatt's life, and, although they had no real basis for determining the extent of the plaintiffs' loss,

they found a verdict for $5,000. In the absence of proof of the extent of the pecuniary loss, the jury can allow nominal damages only.

Complaint is made that the court refused to submit three special questions requested by the company. Out of 79 special questions proposed by the company, only 3 were refused by the court, and these in our judgment are not material, and their refusal was not error.

The court also submitted 16 particular questions of fact which were presented by the plaintiffs, and when the jury returned their general verdict these questions were left unanswered. Upon the application of the plaintiffs, they were withdrawn from the consideration of the jury, over the objection of the company. Special Verdicts—Harmless Error.

We think no error was committed in allowing the withdrawal of these questions. They had not been requested by the party objecting to the withdrawal, nor does it appear that the fact that they were presented influenced or affected the company in presenting interrogatories in its own behalf. It does not appear that the questions asked in behalf of the company were framed with reference to those asked by the plaintiffs below, or that the list presented in behalf of the company would have been longer or shorter by reason of the presentation of those which were subsequently withdrawn. In the absence of a showing of prejudice by reason of the withdrawal, it cannot be regarded as a reversible error.

It is finally claimed that some of the findings are not supported by the evidence, and it appears that two of the answers are not strictly accurate. In the view we take of the case, however, they are not deemed to be very material, and when the findings of the jury are considered together they do not betray any passion or prejudice, nor such a willful disregard of the evidence as would warrant the overthrow of the verdict. The judgment will be affirmed. Case at Bar.

NOTES.

Actions for Wrongful Death—Indirect Evidence of Pecuniary Loss.—In actions for wrongful death, specific proof of pecuniary loss is not always essential, it being generally sufficient to show facts and circumstances from which the jury may fairly infer pecuniary loss. Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463; Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138. See also Korrady

v. Lake Shore, etc., R. Co., 131 Ind. 261; Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535; Lustig *v.* New York, etc., R. Co., 65 Hun (N. Y.) 547, *following* Lockwood *v.* New York, etc., R. Co., 98 N. Y. 523.

Same—Same—Age, Habits, Etc.—The value of the services of deceased may be shown by proof of his age, habits, capacity, etc., or by more direct evidence. McKeever *v.* Market St. R. Co., 59 Cal. 294, 19 Am. & Eng. R. Cas. 123; Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235. In Lockwood *v.* New York, etc., R. Co., 98 N. Y. 523, it was held that in but few cases is the plaintiff able to show direct, specific, pecuniary loss suffered by the next of kin from the death, and generally the basis for the allowance of damages must be found in proof of the character, qualities, capacity, and condition of the deceased and in the age, sex, circumstances, and condition in life of the next of kin. The proof may be unsatisfactory and the damages quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can.

But mere proof of the age, health, etc., of deceased is not sufficient to warrant an award of substantial damages, where there is no proof of his earning capacity. McHugh *v.* Schlosser, 159 Pa. St. 480, 39 Am. St. Rep. 699, 34 W. N. C. (Pa.), 33.

HANSON *et al.*

v.

PENNSYLVANIA R. CO.

(*Court of Errors and Appeals of New Jersey, Nov. 22, 1898.*)

Person Killed while Driving across Track before Moving Train—Nonsuit.*—The contributory negligence of a person killed by a train while attempting to drive across railroad tracks at a point towards which he saw the train backing before he made the attempt, will bar recovery for his death, even though the flagman was careless in giving signal, and the train hands failed to ring the bell or sound the whistle.

ERROR by plaintiff, to supreme court. *Affirmed.*

W. D. Holt and *C. H. Beasley*, for plaintiffs in error.

Alan H. Strong and *Charles E. Gummere*, for defendant in error.

*See note at end of case.

Hanson *v.* Pennsylvania R. Co

LUDLOW, J. Action was brought in the supreme court by the plaintiffs in error against the defendant railroad company to recover damages for the death of Mr. Peter Wilkes, caused by the wrongful acts or negligence of defendant railroad company, February 18, 1897. The cause was tried at the Mercer circuit, and at the close of the plaintiffs' case a motion to nonsuit, based on contributory negligence of the deceased, was made, and granted by the justice holding said circuit. Exception was sealed, and error assigned on such judicial action, and the writ in this case brought said action here for review. There is no question that the granting of the motion to nonsuit in this case was right. The facts as disclosed by the evidence of the plaintiffs, and as to which there is no dispute, are that Mr. Wilkes, now deceased, drove from his place of business, on Canal street, into Greenwood avenue, Trenton, about midday of February 18, 1897, and thence over the bridge forming part of said avenue, going westerly. This bridge is of the width of the avenue, and from its westerly end the avenue continues as a paved street to the Canal Bridge, which is a short distance westerly from the crossing of the Pennsylvania Railroad, used generally for its freight trains, and is laid across the avenue nearly at right angles therewith. Between this crossing and the westerly end of the avenue bridge there is a distance of about 44 feet of paved avenue or highway, clear and open. On the day mentioned, Mr. Wilkes, who was familiar with this locality and its surroundings, drove in a light carriage, drawn by a single horse, across the avenue bridge, going at the gait of about eight miles an hour. When he reached the west end of the bridge, he did not slack up the gait of his horse, but drove on for the crossing. As he reached the west end of this avenue bridge, a backing moving freight train had just entered on and was going on and over the said railroad crossing, in his plain view, moving at about eight miles an hour, and rapidly shutting off for the time any passage over the crossing. Mr. Wilkes did not pull up his horse, check his speed, or halt, but continued on, attempting the dangerous venture of driving over that crossing ahead of the approaching train, and he persisted in this, against the protesting action of the flagman, and his efforts to check him. When he reached the west end of the avenue bridge, and even when the flagman tried to check him, he was safe, and had abundance of time and place to avoid any risk or danger. It was his duty to stop

Case Stated.

Note

and wait until the moving backing train, in his clear view, had left or passed over the crossing. But, having his horse well in hand, and determined on his venture, he drove to one side of the flagman, passing him, and made for the crossing, taking the risks. He failed to clear it, and the approaching train struck and caught the rear part of his carriage, pushing it, and crushing it on and along the railroad tracks, and Mr. Wilkes in a few moments was drawn out from the wreck, fatally injured. It may be, as was argued by the plaintiffs, that the railroad company was negligent in its flagman being inert and careless in giving signal, and in the failure of the train hands to ring the engine bell and to sound the locomotive whistle; but this, if true, did not in the least excuse or justify or warrant the negligence and utter lack of ordinary prudence, care, and precaution on the part of Mr. Wilkes as to his own safety and protection under the circumstances of this case. Such negligence of the company's employees, if there was any, was no excuse for his temerity. The injuries which came to Mr. Wilkes on the occasion referred, and which resulted in his death, were brought about from his own negligent conduct. The judgment of the supreme court is affirmed.

NOTE.

Crossing before Moving Train.—See Burnett *v.* Eastern & A. R. Co. (N. J.), 10 Am. & Eng. R. Cas., N. S., 469 and *note*, p. 471.

Where the testimony of the person injured shows that he saw the train approaching and attempted to run across the track in front of it, in doing which he was struck and injured, he cannot recover, even though there was a failure to sound the whistle. Said the court: "It was the duty of the engineer, approaching the station, to sound the whistle at a point some distance from the station. Witnesses were introduced by appellant whose testimony tended to prove that the engineer did not sound the whistle, while all the officers and servants on the train testify it was done. It seems to us that if there was a failure to sound the whistle, such failure would not entitle the appellant to recover. The object in requiring the whistle to be sounded and bells to be rung is to give notice of the approach of the train. The appellant discovered the train was coming and he negligently attempted to cross the track in front of it. It cannot be said that a failure to sound the whistle was the proxi-

mate cause of the injury." Helm *v.* Louisville & N. R. Co., (Ky., 1895) 33 S. W. Rep. 396.

An instruction that the statutes of the state and ordinances requiring whistles to be sounded or bells to be rung on trains are designed and intended to warn people of the approach of such trains, and that if a person approaching a track sees a train approaching on it, it his duty to avoid going upon it, and into danger of collision with the train, and if he sees the train, it is immaterial so far as he is concerned, whether the signals are given or not, is not error. McManamee *v.* Missouri Pac. Ry. Co. (Mo.), 5 Am. & Eng. R. Cas., N. S., 474.

LOUISVILLE & N. R. CO.

v.

CLARK'S ADM'R.

(*Court of Appeals of Kentucky, Feb. 7, 1899.*)

Death at Crossing—Contributory Negligence—Presumptions.*—Where there is no evidence on the subject, the presumption is that a person killed by a train at a public crossing was exercising due care in attempting to cross the track.

Same—Instructions.—In an action for the death of a person so killed, it is proper to refuse an instruction in which it is assumed that certain facts, as to which there was no evidence, had been established, and which requires that all the care and caution should have been exercised by deceased.

Same—Same—Signboards—Pleading.*—Where plaintiff in such action sets out in the petition certain specified acts of negligence for which he seeks to recover, he cannot prove or rely upon different acts of negligence, and it is prejudicial error to instruct as to the duty of defendant to maintain crossing signboards where defendant's failure to do so is not alleged in the pleadings.

Same—Same.—In such action it is prejudicial error to tell the jury that defendant is liable "if its servants in charge of its train failed to do anything they were required to do, such instruction being too indefinite.

Same—Contributory Negligence.—Contributory negligence may

*See notes at end of case.

bar recovery in such action, although it was not the sole cause of the accident.

Same—Instructions.—An instruction that trainmen should exercise "greater care" when approaching a dangerous crossing is too vague,—what "greater care" consists of should be specifically set out.

Measure of Damages.—In such action, it is error to instruct the jury "to find for plaintiff such a sum as in the opinion of the jury, from the evidence, deceased would have earned during the remainder of his life if he had been permitted to live until he died of natural causes", the measure of recovery in such actions being such sum as will compensate the estate of deceased for the destruction of his power to earn money.

APPEAL by defendant from Hardin county circuit court. *Reversed.*

W. H. Marriott, *H. W. Bruce*, and *Edward W. Hines*, for appellant.

W. S. Pryor, *S. M. Payton*, and *W. H. Holt*, for appellee.

BURNAM, J. This is an appeal from a judgment in favor of appellee, as administrator of W. J. Clark, against appellant, for $10,000 in damages for the loss of intestate's life.

Case Stated. The petition, in substance, alleges that decedent was killed by one of defendant's southbound freight trains at the point where a public road, known as the "Litchfield Road," in Hardin county, crosses defendant's track. It is charged that this crossing is specially dangerous by reason of "an embankment and other obstructions" standing on defendant's right of way, which prevented plaintiff's intestate from observing the approach of the train before he attempted to cross the track, and that defendant's agents failed to give warning of the approach thereof, either by ringing of the bell or blowing of the whistle, as required by law. All the material allegations of the petition as amended were denied by the answer, and the defendant charged that plaintiff's intestate was guilty of such contributory negligence in causing the accident which led to his death as prevents recovery.

The testimony for appellee, as to the failure of appellant's servants to blow the whistle or ring the bell as they approached this crossing, is confined to witnesses who, at the time of the killing, were located at a considerable distance from the actual place of the accident; and they all testify, in

substance, that they did not hear any bell rung or whistle sounded as the train approached the crossing, their attention being first directed thereto after it had passed beyond the crossing by the signals to stop the train and back up. And there is a good deal of testimony to the effect that the crossing was an unusually dangerous one, from the fact that the approach of the train was to some extent obscured by a long cut north of the crossing, and by the further fact that in the original construction of the road a part of the earth excavated from the cut had been thrown upon the right of way adjacent to the excavation and allowed to remain there; and there is some testimony to the effect that at the time of the injury this embankment was covered with high weeds, bushes, and briers, which materially obstructed the view of the approaching trains from travelers upon the highway, and that the corn growing upon the adjacent land also aided in obstructing the view of such travelers. The evidence tends to show that the cut and embankment together was about 5 feet high 200 feet north of the crossing, and gradually slopes to grade as it is approached, being only 2 feet 3 inches 50 feet away. No witness was introduced for appellee who saw the accident, or saw the deceased as he approached the crossing, while the engineer, fireman, and brakeman in charge of the train that killed him all testify that the usual signals were given for the crossing, by blowing the whistle and ringing the bell; and there was also testimony for appellant that there were no weeds, bushes, or other obstructions on the right of way sufficient to prevent travelers from seeing an approaching train; that the main obstruction was the corn, heretofore referred to, and the cut through which the train passed. Two of these witnesses testified that they had made experiments to ascertain whether a person, sitting in an ordinary road wagon, could see a train coming from the north before his team got on the track; and they found, when the tongue of the wagon got within 16 feet of the nearest rail, he could see the smoke-stack of an approaching locomotive for more than 500 feet north of the crossing, and that when the head of his horses got within 6 feet of the track he could see for more than 1,000 feet down the track; and this testimony is corroborated by a number of other witnesses. Deceased was a tenant on a farm about five miles from Elizabethtown, and in making the trip from his home to town he habitually traveled the Litchfield road. On the day of the accident which resulted in

his death, he had been to town to deliver a load of wheat, and had started back for another load, and was driving an empty wagon drawn by two mules. Before he reached the crossing he was compelled, on account of a rain storm which came up suddenly, to stop in a barn on the side of the road. Frank Brown—who was also driving a wagon in the same direction, and who sought shelter from the rain in another barn further from the railroad than that in which Clark took shelter—testifies that deceased "passed him in a trot before he [Brown] stopped in out of the rain"; while one Thomas Weatherly, who is the only witness who testifies to seeing Clark after he left his place of shelter after the rain, testifies that when he last saw him he "was within fifty feet of the railroad crossing, driving at a pretty rapid rate." The fireman on appellant's train testifies that he first discovered decedent crossing the railroad track "at a run when the train was within thirty to sixty feet of the crossing." There is no evidence that the collision could have been averted by any act of the agents of the defendant.

Under this state of proof, appellant's counsel moved for a peremptory instruction, which the court refused to give, and this is the first ground relied on for reversal.

Death at Crossing—Contributory Negligence—Presumptions.

It is the general rule that questions of fact are to be submitted to the jury, and this includes, not only cases where the facts are in dispute, but also those where the question is as to the inference to be drawn from such facts after they have been determined. In this case plaintiff's intestate is not here to testify, and there is an absence of evidence as to the care exercised by him in attempting to cross defendant's track; but it cannot be presumed that deceased recklessly or carelessly imperiled his own life or entered upon the track knowing of the train's approach. "If the presumption of negligence arises from the mere fact that deceased was killed on the track at a place where he had a right to be, it must necessarily defeat recovery in all such cases, unless it appear that those in charge of the train, after discovering the dangerous condition of the parties injured, could, by the exercise of ordinary care, have avoided inflicting the injury." See Railroad Co. *v.* Goetz's Adm'x, 79 Ky. 447. This doctrine might apply if the party injured was on the track where he had a right to be, but has no application to a case like this, where the accident occurred at the crossing of a public highway.

Appellant asked the court to give the following instruction, which was refused: "If the jury believe from the evidence that plaintiff's intestate saw or heard, or could by the exercise of ordinary care have seen or heard, the approaching train, before he was upon the track, it was want of ordinary care upon his part to go upon the track in front of said train." Same—Instructions.

"A traveler approaching a railroad track crossing a highway is bound to exercise ordinary prudence,—such prudence as is fairly commensurate with the nature of the risk. * * * No man has a right to depend entirely on the care and prudence of others. He is bound himself to exercise due care to prevent injury to himself from the lack of proper caution in others. He is bound to take such measures as common prudence, in view of the danger and consequences of neglect to do so, suggests." See 2 Wood, R. R. p. 1520. "From the character and *momentum* of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and the right of way, but it is bound to give due warning of its approach; so that the wagon can stop and allow it to pass, and use every exertion to stop if the wagon is inevitably in the way; but such warnings must be reasonable and timely." See Improvement Co. *v.* Stead, 95 U. S. 164, and Railroad Co. *v.* Goetz's Adm'x, *supra*. Section 786 of the Kentucky Statutes requires that "every railroad company shall provide each locomotive passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung, or whistle sounded, outside of incorporated cities and towns, at a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing." And the rate of speed of a train must be such that, together with the warning signals given, travelers near or on the crossing may have reasonable time to avoid danger. This does not require that there should be a material reduction in the rate of speed on approaching every highway crossing, as such requirement would prove a most serious hindrance to rapid transportation, which is the chief object of railroads; but it does require that the speed shall not be so great as to render the precautionary signals unavailing, particularly where the view of the track is unobstructed. See 2 Wood, R. R. p. 512, and authorities there

cited. The proof in this case shows that the train was traveling at the usual rate of speed, and it was the duty of deceased, in approaching the crossing, to use that degree of care which is dictated by common prudence, in view of the peril to which he may have been exposed. We think the instruction asked was properly refused, because it assumed that certain facts had been established, and required that all the care and caution should have been exercised by the deceased. A similar instruction was passed upon by this court in Railroad Co. *v.* Goetz's Adm'x, *supra*.

By the tenth instruction the court told the jury that it was the duty of the defendant to erect and maintain certain signboards at the crossing, so as to give notice to persons traveling on the highway that they were approaching a railroad track. There is no averment in the petition that defendant failed to perform this duty, or that the injury was caused by such failure on its part. When a plaintiff sets out in his petition certain specified acts of negligence for which he seeks to recover, he cannot prove or rely upon different acts of negligence. Defendant could not have anticipated that such an issue as this was to be made on the trial, or be prepared to rebut any imputation of negligence which might arise from such failure. If it had been alleged as a ground of negligence, defendant would have had the right to controvert it, and might have been able to prove that the signboards had in fact been erected. To keep such signboards at railroad crossing is a statutory requirement, and the failure to observe the requirement would have been an act of negligence. It seems to us that the instruction was clearly erroneous and prejudicial. See McCain *v.* Railroad Co. (Ky.) 18 S. W. 537; Bridge Co. *v.* Brennan, 16 Ky. Law Rep. 126; Givident's Adm'r *v.* Railroad Co. (Ky.) 32 S. W. 612.

Same—Same—Signboards—Pleading.

By the twelfth instruction the jury were told "that if they believed, from the preponderance of the evidence, that the killing of deceased was caused by the negligence of defendant's servants in charge of its train, in failing to do any duty they were required to do, if they did so fail, or by reason of the failure of the defendant to keep its track clear of obstructions, or to remove the timber or brush or other obstructions along its track, if it did so fail in any of these matters, they should find for the plaintiff, unless they believe from the evidence that the deceased was guilty of such contributory

Same—Same.

negligence as caused his own death, as set out in the sixth instruction." This instruction was erroneous and prejudicial to defendant in two particulars: First, in telling the jury that defendant was liable "if its servants in charge of its train failed to do any duty they were required to do." These words are vague and indefinite, and leave the jury to speculate as to their meaning and the duty of defendant's servants in approaching a dangerous crossing. Under them, the jury might well have concluded that, in addition to the signals required by the statute, it was the duty of defendant to slacken speed of its train on coming to the crossing, or to do something additional, which, in the judgment of the jury, was a part of its duty. The statute imposes upon those in charge of a train the duty of blowing its whistle and ringing its bell at a distance of 50 rods before a crossing is reached; and, while there may be circumstances and conditions under which these statutory regulations would not be the limit of the duty of those in charge of trains in approaching a dangerous public crossing, yet, if the conditions actually required greater and additional precautions than those imposed by the statute, it was the duty of the court, in terms, to point out in what this additional duty consisted. And the closing words of the instruction, "unless they believe from the evidence that the deceased was guilty of such contributory negligence as caused his own death, as set out in the sixth instruction," were misleading. By these words the jury were told that the contributory negligence of deceased must have been such as to wholly cause his own death. In Avery *v.* Meek, 14 Ky. Law Rep. 814, this court said: "It was an error to require the jury to believe, in order to find for the defendant on the ground of plaintiff's contributory negligence, that the injury was caused by the plaintiff's negligence, as this required them to believe that it was caused wholly by the plaintiff's negligence. Although the consequence of contributory negligence on plaintiff's part was declared in other instructions, this did not cure the error." See, also, Speed *v.* Carpenter, 14 Ky. Law Rep. 271, and Railway Co. *v.* Chatterson, 14 Ky. Law Rep. 633.

Same—Contributory Negligence.

We think the words "greater care," used in the sixteenth instruction, taken in the connection in which they are used, are objectionable, because they are too broad and indefinite. What the "greater care" consisted in ought to have been specifically set out. In approaching a dangerous public crossing, it is the duty of those in

Same—Instructions.

charge of a train to keep a more careful lookout, and give the signals required by the statute.

By instruction 19, the jury were told "to find for plaintiff such a sum as in the opinion of the jury, from the evidence, deceased would have earned during the remainder of his life if he had been permitted to live until he died of natural causes, considering his physical condition and power and ability to earn money at the time of his death." This court has often said that the measure of recovery in an action of this kind is such a sum as will compensate the estate of deceased for the destruction of his power to earn money. See Railroad Co. *v.* Case's Adm'r, 9 Bush, 736; Railway Co. *v.* Lang's Adm'r (Ky.) 41 S. W. 271; Railroad Co. *v.* Kelly's Adm'r (Ky.) 38 S. W. 852; Railroad Co. *v.* Eakin's Adm'r (Ky.) 45 S. W. 529. The instruction in this case takes from the consideration of the jury all questions of this kind, and tells them that they should find such a sum as in the opinion of the jury, from the evidence, deceased would have earned during the remainder of his life. And the use of the words, "if he had been permitted to live until he died of natural causes, considering his physical condition," etc., is also objectionable, as they exclude from the consideration of the jury death from any but natural causes. Under this instruction, they might conclude that only death from old age is death from natural causes, and make a guess as to how long a robust man of the age of deceased would probably live, disregarding altogether the possibility of his death from accidental causes and the evidence as to his expectation of life. This instruction was misleading and prejudicial to defendant.

Measure of Damages.

Quite a number of other errors are complained of by appellant, which are unnecessary to consider; but for the errors pointed out the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

NOTES.

Accident at Crossing—Presumption of Negligence.—(*f*) *That Injured Person was Negligent.*—In Indiana and Maine it has been held that negligence upon the part of the person injured will be presumed from the mere fact of the injury at a crossing.

Indiana.—Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279, 55 Am. Rep. 736, 25 Am. & Eng. R. Cas. 322.

Notes

Maine.—Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744, 19 Am. & Eng. R. Cas, 356; State *v.* Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622, 19 Am. & Eng. R. Cas. 312.

(*z*) *That Injured Person was not Negligent.*—In other jurisdictions it has been held that, in the absence of evidence of his negligence, the presumption that the injured person exercised care will prevail.

Thus in *Pennsylvania*, where the "stop, look, and listen" doctrine is applied most rigidly, it is held that it is not incumbent on the plaintiff to show affirmatively that the decedent, killed upon a railway crossing, stopped, looked, and listened, before attempting to cross the track. In a case of this character, the Supreme Court of Pennsylvania says: "The common-law presumption is that every one does his duty, until the contrary is proved; and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar no witness was called who saw the occurrence; there is no evidence whatever, whether, in fact, the decedent did stop and look and listen; the presumption is that he did; proof of that fact was no part of the plaintiff's case. The presumption is of fact merely, and may be rebutted; but we are without evidence on the subject. All that we have is, that, as he came upon the railroad, he was struck down by the locomotive." And it was held that a recovery could be sustained. Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468. See also:

Alabama.—Bromley *v.* Birmingham, etc., R. Co., 95 Ala. 403, *citing* 4 Am. and Eng. Encyc. of Law (1st ed.), p. 76.

Missouri.—Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 39 Am. Rep. 503; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 626.

Pennsylvania.—Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407.

And it has been held that a jury may infer due care, and the absence of contributory negligence, on the part of a deceased person, from the general and well-known disposition of man-kind to take care of themselves and keep out of danger.

California.—Gay *v.* Winter, 24 Cal. 153.

Maryland.—Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

New York.—Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

Pennsylvania.—Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361.

(*3*) *Correct Rule.*—But the correct rule is that there is no presumption either way, and when negligence on the part of the railway company

sufficient to account for the injury has been shown, and there is no evidence of contributory fault, the burden of the issue should shift, and the plaintiff be entitled to recover, unless contributory negligence be affirmatively proved; the principle being that a sufficient cause having been shown, and no intervening efficient cause appearing, the negligence of the company should be held the sole proximate cause of the injury. As the mere fact of the injury raises no presumption that the railway company was negligent, it certainly should not raise one that the injured person was.

United States.—Mutual Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44; Scheffer *v.* Washington City R. Co., 105 U. S. 251, 8 Am. & Eng. R. Cas. 59.

Michigan.—Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 57 Mich. 488.

Pennsylvania.—Pennsylvania Co. *v.* Marshall, 119 Ill. 399.

Texas.—Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 181.

In an *Illinois* case the doctrine stated above seems to have been directly declared. It was there held that at the conclusion of the plaintiff's evidence it would have been proper to nonsuit the plaintiff, because no evidence had been given of negligence upon the part of the defendant, but that when it appeared from the evidence given for the defendant that it had been guilty of negligence, a recovery could be sustained without direct proof that the deceased was free from fault. Chicago, etc., R. Co. *v.* Carey, 115 Ill. 115. See to the same effect:

Georgia.—Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644.

Iowa.—Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 18 Am. & Eng. R. Cas. 217.

Maryland.—Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

New York.—Jones *v.* New York Cent. R. Co., 28 Hun (N. Y.) 364; Smedis *v.* Brooklyn, etc., R. Co., 23 Hun (N. Y.) 279.

Pennsylvania.—Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

"If the plaintiff's evidence shows an injury by defendant's negligence, and does not raise an implication that his own contributed, the burden of proving such contributory negligence as will defeat a recovery rests upon defendant." Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 630. See also Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

It may be thought that these principles are only applicable in jurisdictions where the burden of proof of contributory negligence is upon the defendant, but a little reflection will show that this is not true. Even where the burden of proving freedom from contribu-

tory negligence is on the plaintiff, it is quite sufficient, on principle, to show that the defendant's negligence was adequate to have caused the injury, and that there is no evidence of any other sufficient cause; that is, no evidence of fault on the plaintiff's part, or on that of the deceased. In such case the law must ascribe the injury to the only cause found.

The True Rule—No Presumption Either Way.—"In cases where such issues are made, the question of contributory negligence on the part of the plaintiff or his intestate, and of negligence on the part of the defendant, causing the injury complained of, should be considered and determined upon the same principles and by the same rules exactly. There is no presumption of negligence as against either party, except such as arises upon the facts proved. Indeed, the presumption of law is, that neither party was guilty of negligence; and such presumption must prevail until overcome by proof." Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. Rep. 633.

"But it is urged that, inasmuch as no witness testifies that the intestate looked to see, or listened to hear, if the defendant's train was approaching, it must be assumed that he did not, and that such omission was negligence on his part. We know of no such rule. While it is true that a traveler, on approaching a railroad crossing, is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that a jury is authorized to find that he did not look, and did not listen." Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445.

"When the plaintiff shows negligence on the part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence." Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690.

"While those on the highway, when about crossing a railroad track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life, or entered upon the track of the road knowing of the train's approach." Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

So the doctrine, that when an efficient, adequate cause appears it must be held the sole proximate cause in the absence of evidence of any other, is easily supported. Thus, "an efficient, adequate cause being found must be deemed the true cause, unless some

other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." Adams *v.* Young, 44 Ohio St. 80, 58 Am. Rep. 789; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

In Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, it was said: "Where there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect and proximate to it." In such cases it is necessary to determine the proximate cause of the injury or death; and the defendant's negligence once established, and no other proximate cause being shown, such negligence should be held the sole proximate cause.

Pleading Negligence.—See Brown *v.* Chicago, R. I. & P. Ry. Co. (Kan.), 10 Am. & Eng. R. Cas., N. S., 148, and *note*, p. 413.

CHICAGO & A. R. CO.

v.

BLAUL.

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Absence of Flagman—Obstructed View—Contributory Negligence.*—A driver of a vehicle knowing that a flagman is usually stationed at the crossing has a right to presume that he is at his post, and, in the absence of any warning or signal of danger, is not chargeable with negligence in proceeding to cross the tracks, even though the view is somewhat obstructed.

Same—Question for Jury.—Whether plaintiff was in the exercise of ordinary care at the time of the accident was a question for the jury.

Excessive Damages.—$5,000 are not excessive damages for an injury to the spinal cord likely to result in permanent paralysis.

APPEAL by defendant from Second district appellate court. *Affirmed.*

George S. House, for appellant.
Donahoe & McNaughton, for appellee.

PER CURIAM. The appellate court, speaking through Mr. Justice CRABTREE, in deciding this case delivered the follow-

*See note at end of case.

ing opinion: "This was an action on the case, brought by appellee, to recover damages for injuries sustained by her in consequence of a collision with one of appellant's trains of cars, which came in contact with a buggy in which appellee was riding, at the intersection of appellant's railway tracks with Fifth avenue, in the city of Joliet. There was a trial by jury, resulting in a verdict and judgment for appellee for $5,000. This court is asked to reverse the judgment upon the sole ground that the evidence does not show appellee was in the exercise of ordinary care for her own safety at the time of the accident which caused her injury. It appears from the evidence that on December 8, 1894, appellee left her home, in Chicago, in company with her husband and infant child, and proceeded to Joliet, over appellant's railroad. On arriving at the station in Joliet, the party were met there by appellee's brother, Dennis Van Garvin, and one William Smith, who had in waiting a light spring wagon, for the purpose of conveying the visitors to Van Garvin's home, about two miles southeast from Joliet. Appellant's railway at Joliet crosses Fifth avenue nearly at right angles, and at the street crossing it has three tracks, the easterly track being the south-bound main, the one next west the north-bound main, and the westerly track being what is known as a side track. When the party started for Van Garvin's home, there were seated in the light wagon Van Garvin and Smith upon the front seat, the former sitting on the right-hand side, and driving, while the rear seat was occupied by appellee, with her babe in her arms, and her husband sitting beside her, and a small boy sat in the wagon box behind the rear seat. Proceeding in this manner easterly along Fifth avenue, the party came to the right of way of appellant's railroad, and as they reached that point a long freight train, consisting of about forty box cars, was then being drawn over the Fifth avenue crossing in a northerly direction, along the north-bound main track. Van Garvin, who was still driving, brought his horse to a standstill, and waited for this freight train to pull across the street, and about the time the caboose or rear car reached the north sidewalk, seeing nothing to prevent his going forward, and there being no gates closed or flagman at the crossing to give notice or warning of danger, he started his horse towards home, when, just as he reached the easterly or south-bound main track, and was in the act of crossing, a train, consisting of an engine and seven or eight flat cars, bore down upon them

Case Stated.

at a rapid rate of speed from the north, striking the wagon in which appellee was riding, throwing the occupants of the vehicle a distance of some twenty or twenty-five feet, and inflicting upon the person of appellee serious injuries.

"It is frankly admitted by counsel for appellant that under the ordinances of the city of Joliet it was the duty of appellant to have a flagman at the crossing, and that one is usually on duty there, but that at the particular time of this accident he had left his post on some other business, and was then absent from his place of duty ; and counsel concedes that this was negligence on the part of appellant, but he contends that notwithstanding this negligence of appellant, appellee cannot recover, because she had commited her safety to Van Garvin, the driver of the vehicle, and that the latter was guilty of negligence in not ascertaining that the east track was safe to cross before attempting to pass over it; that, inasmuch as the view was obstructed to some extent by the freight train upon the northbound main track, he should have waited until he could know with certainty that it was safe for him to cross. It is argued that because Van Garvin knew there was usually a flagman at the crossing he should have waited until notified by the flagman that it was safe to cross. Counsel says in his argument: 'He [Van Garvin] knew that at this crossing there was stationed a flagman, whose duty it was to notify persons riding in vehicles when it was safe to cross.' But we think this is a misapprehension of the duty of a flagman under the ordinance put in evidence, and is not according to the general understanding of the public, nor the almost universal custom of flagmen on such duty. It is only when there is danger, caused by the approach of trains, that the flagman displays any signal, or gives any notice to the traveling public. When it is safe to cross, the flagman does nothing, as a general rule ; but when there is danger he gives notice, or should do so. This being the almost universal custom, we think Van Garvin, knowing that a flagman was usually stationed at this crossing, had a right to rely on the presumption that he was at his post, and would do his duty, and that, in the absence of any warning or signal of danger, he was not chargeable with negligence in proceeding to cross the tracks. Had the flagman been at his post, and given the danger signal, the accident would not have happened. While appellee's party

Absence of Flagman—Obstructed View—Contributory Negligence.

were waiting for this freight train to go by, other teams had gathered there, also waiting to cross, and all seem to have started forward about the same time, the crossing appearing to be clear, and none of them apprehending danger. They no doubt relied upon the presumption that the flagman was at his post,and would do his duty, warning them of danger if it existed. This presumption they had the right to indulge and to act upon. 'The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track ; and the public have a right to rely upon a reasonable performance of that duty.' Railroad Co. *v.* Hutchinson, 120 Ill. 587, 11 N. E. 855. Fifth avenue was a largely traveled thoroughfare, and it was the duty of appellant to keep a flagman in constant attendance there. In his absence, to run a train over the crossing at a dangerous rate of speed was great negligence, and rendered appellant clearly liable for injury resulting therefrom to any one in the exercise of ordinary care for his or her own safety. Whether appellee was in the exercise of such care at the time of the accident was a question of fact for the jury, and we cannot say their finding on that point was wrong. On the contrary, we think it was fully justified by the evidence, and we cannot reverse the judgment upon that ground.

Same—Question for Jury.

"It is claimed that the damages are excessive, but we cannot say that the jury were not warranted in finding the amount they have awarded. From the evidence the jury had a right to believe that appellee has sustained an injury to the spinal cord, from which she is in danger of permanent paralysis; and, if so, certainly the damages are not excessive. We do not need the testimony of expert physicians to tell us that injuries of the character received by appellee frequently do result in paralysis. The extent of the injury may not be at once apparent, but the result may be a total wreck of the entire system. The jury heard the testimony of the witnesses and the opinions of the medical experts who had examined appellee, and they saw and had the opportunity of observing her for themselves, and we are not disposed to substitute our judgment for theirs, under all the circumstances of the case.

Excessive Damages.

"No complaint whatever is made of the instructions, and, finding no error in the record, the judgment will be affirmed."

We adopt the foregoing opinion as that of this court, and

the judgment of the appellate court is affirmed. Judgment affirmed.

NOTE.

Accident at Crossing—Flagmen—Signals.—The duty of a flagman or watchman stationed at a crossing is in its nature somewhat similar to that of a gateman. He should protect the traveling public by signaling the approach of trains, and in the absence of signals may, it has been held, give the public the right to presume that the tracks are clear. Chicago, etc., R. Co. *v.* Wilson, 133 Ill. 55, 42 Am. & Eng. R. Cas. 153, *affirming* 35 Ill. App. 346; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586, *affirming* 33 Ill. App. 129; Chicago, etc., R. Co. *v.* Hutchinson, 120 Ill. 587, 32 Am. & Eng. R. Cas: 82; Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 10 Am. St. Rep. 136. But see Smith *v.* Wabash R. Co., 141 Ind. 92. See also St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197; Wilkins *v.* St. Louis, etc., R. Co., 101 Mo. 93.

SMITH

v.

ELECTRIC TRACTION CO.

(*Supreme Court of Pennsylvania, July 21, 1898.*)

Accident at Street Crossing—Street Cars—Right of Way.*—One who deliberately drives immediately in front of an approaching street car at a street crossing cannot recover for resulting injuries, he not being entitled to act under such circumstances on the assumption that, if he reaches the crossing first, he is entitled to go on, the car having the right of way.

APPEAL by plaintiff from Philadelphia county court of common pleas. *Affirmed.*

William F. Harrity, *James M. Beck*, and *Alfred R. Haig*, for appellant.

Henry C. McDevitt and *Thomas Leaming*, for appellee.

FELL, J. There is no foundation for the claim made on behalf of the appellant that this case is governed by Callahan *v.* Traction Co., 184 Pa. St. 425, 39 Atl. 222. The accident

*See note at end of case.

in that case happened in the daytime, at the intersection of a comparatively narrow street in the business center of the city, and at a crossing where, because of the constant use of one of the streets by vehicles, it was the duty of the motorman to exercise unusual vigilance and care. The plaintiff brought his horse nearly to a stop when the front wheels of his wagon were on the foot crossing, and he looked for a car. He saw one 250 feet from him, which had just crossed a main street on which was a double-track railway. He did not observe whether the car was then in motion, but he knew that in crossing the street it had necessarily moved slowly, and that, if in motion, it was starting from a full stop or from a greatly reduced speed. When he reached the track, the car was so close to him that he was unable to turn his horse to one side quickly enough to avoid a collision. The car was running so rapidly that it was not stopped within 150 feet. He looked when at the crossing, and drove on, intending to cross, but he did not relax his vigilance. He looked again before his horse had stepped on the track, and then attempted, not to cross in front of the car, but to avoid an unexpected danger by turning aside. His horse's head was first struck by the car. The plaintiff in that case looked when in the right place to look. He was so close to the track, with his horse in motion, and the car was at such a distance from him, that the motorman had notice of his intention to cross in advance of the car. He had ample time to cross in safety if the car had moved at anything like the ordinary speed. He looked again as he drove from the crossing 15 or 20 feet towards the track, and he was suddenly confronted by a danger he had no reason to anticipate. The facts in the case before us are fully and clearly stated in the opinion of the learned judge who tried it, and a brief reference to them is sufficient to distinguish the case from Callahan *v.* Traction Co., *supra*. The plaintiff was driving at night, in a dark-covered wagon, in a city street. At the distance of 75 feet from the track, he could have seen the car. He did see it when he was 50 feet from the track. It was heavily loaded, and was approaching on a downgrade. He saw it again as his horse was about to step on the track, and noticed that it was near him; but he went on without even quickening the pace of his horse. One of his witnesses testified that the car was within 20 feet of him when he drove in front of it, and the plaintiff said it was "pretty near," and, "I seen it, but I thought I could get away. The car was supposed to stop." The car was so

near that the witnesses who saw the occurrence seem to have expected a collision, and it was running so slowly that it was stopped within a few feet of the place of the accident. The plaintiff evidently acted on the assumption that, if he reached the crossing first, he was entitled to go on, and that the duty of avoiding a collision rested entirely with the motorman; and acting on this assumption, with a full knowledge of the situation, he placed himself in a position of manifest danger. A clearer case of contributory negligence than this it would be difficult to find. While street-railway companies have not the exclusive use of their tracks at crossings or other parts of the street, their rights are superior to those of the public. "Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, the fact that the cars cannot turn out or leave the track; and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an individual who seeks to cross their tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle." Ehrisman *v.* Railway Co., 150 Pa. St. 180, 24 Atl. 596. This rule had before been applied in Thomas *v.* Railway Co., 132 Pa. St. 504, 19 Atl. 286, Warner *v.* Railway Co., 141 Pa. St. 615, 21 Atl. 737, and Carson *v.* Railway Co., 147 Pa. St. 219, 23 Atl. 369, and has since been followed in Omslaer *v.* Traction Co., 168 Pa. St. 519, 32 Atl. 50, and many other cases. The judgment is affirmed.

NOTE.

Collisions between Street Cars and Other Vehicles at Crossings—Right of Way.—As between a street car and an ordinary vehicle at a street crossing, neither party has any paramount right of way, and, in cases of collision at street crossings, the rights of the parties are to be determined by the law applicable to ordinary vehicles. Buhrens *v.* Dry-Dock, etc., R. Co., 53 Hun (N. Y.) 571; *affirmed* 125 N. Y. 702.

In O'Neil *v.* Dry-Dock, etc., R. Co., 129 N. Y. 125, 52 Am. & Eng. R. Cas. 573, the court said: "As the cars must run upon the tracks.

and cannot turn out for vehicles drawn by horses, they must have the preference, and such vehicles must, as they can in a reasonable manner, keep off from the railroad track so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles the railways have the paramount right to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has a right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other." See also New Jersey Electric Ry. Co. *v.* Miller, N. J., 1897, 6 Am. & Eng. R. Cas., N. S., 519.

WILSON

v.

MINNEAPOLIS ST. RY. CO.

(*Supreme Court of Minnesota, Dec. 5, 1898.*)

Accident at Street Crossing—Care Due from Street Railway, and from Driver of Vehicle—Instructions.*—Action for the recovery of damages for injuries sustained by the plaintiff in a collision at a street crossing between his wagon and the defendant's electric cars. The trial court submitted the question of the defendant's negligence and of the contributory negligence of the plaintiff to the jury, and gave to them these instructions: "(1) Street cars are, in the main, governed by the same rules as other vehicles on the street, and their owners have only equal right with the traveling public to use the street. (2) A street-railway company must at least exercise as much care to avoid collision with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars. (3) When a driver of a vehicle approaching a street-railway track to cross it sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to

*See Smith *v.* Electric Traction Co. (Pa.), *ante*, and *note*.

attempt it; and it is not negligence *per se* in him to attempt it without looking a second time at the car, or for the approach of the car." *Held*, that each of the instructions was misleading and prejudicial.

(Syllabus by the Court.)

APPEAL by defendant from Hennepin county district court. *Reversed.*

Koon, Whelan & Bennett, for appellant.

Frank D. Larrabee, for respondent.

START, C. J. The plaintiff, while driving a four-horse team attached to a lumber wagon across a public street in the city of Minneapolis upon which the railway tracks of the defendant were located, was injured in a collision between its electric cars and the wagon. This action was brought to recover for his injuries so sustained. The verdict was for the plaintiff in the sum of $3,083, and the defendant appealed from an order denying its motion for a new trial. The trial court submitted to the jury the question of the defendant's negligence; also the question of contributory negligence on the part of the plaintiff; and gave to the jury, with other instructions, the following: "(1) Street cars are, in the main, governed by the same rules as other vehicles on the street, and their owners have only equal right with the traveling public to use the street. (2) A street railway company must at least exercise as much care to avoid collision with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars. (3) When a driver of a vehicle approaching a street-railway track to cross it sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it; and it is not negligence *per se* in him to attempt it without looking a second time at the car, or for the approach of the car."

1. The first instruction was given to the jury as an absolute rule of law as to the relative rights of the owners of street cars and those of other vehicles in the public streets. The instruction was incomplete, for it omitted the necessary modifications of the general rule, growing out of the difference in the nature of the two classes of vehicles, such as the construction, motive power, mode of operation, and speed of each. The instruction ignored all of these matters. It is true, as a general proposition, that a street-railway company has no

proprietary and superior right to the part of the street whereon its tracks are placed, and that the duty of exercising due care to avoid collisions rests upon it, as well as upon the owner or driver of other vehicles. But the duty is relative, and in determining in a given case whether either has exercised ordinary care, attention must be paid to the differences to which we have referred. Thus ordinary care and the law of the road require the driver of an ordinary vehicle passing another going in the same direction to drive to the left of the middle of the traveled part of the road. Gen. St. 1894, § 1946. Of necessity, no such duty rests upon a street-car company. If the driver of such vehicle is on that part of the street occupied by the railway tracks, and ahead of the cars, but driving slower than the convenience and accommodation of the public demand that the cars should go, such driver has not an equal right with the railway company to keep along the track. His duty is to seasonably get off the tracks, and let the cars pass. So, at a street crossing, whether the company has only an equal right with the traveling public, or a greater or a less right, depends on the circumstances of each particular case,—for example, which one acquired the right of way. The instruction as given, without qualification, and as the law of this case, was misleading and prejudicial, although given in a case where the collision was at a street crossing, and there was no question as to the duty of the plaintiff to turn out and let the cars pass.

2. The second instruction is open to the criticism that the words "at least," as used therein, suggest to the jury that they were at liberty to impose a higher degree of care upon those in charge of the cars than is required of the owners or drivers of other vehicles. As already suggested, each must exercise ordinary care to avoid a collision, but it by no means follows that those in charge of the cars must exercise in all cases the same, or at least as much, vigilance as the drivers of other vehicles, in order to discharge the duty of exercising ordinary care. It may be greater or less, according to the circumstances of each case. The amount of vigilance to be exercised by the one in a given case cannot be determined by an arbitrary comparison with that required of the other.

3. The trial court, by the third instruction, in effect directed the jury as a matter of law that, if the plaintiff saw the cars approaching at such a distance that he could apparently make the crossing safely, he had a right to attempt it, and that it was not negligence for him to make the attempt

without looking a second time for the cars. This was a question of fact for the jury. It was for them, upon the facts of this case, to say whether the plaintiff, although he could apparently make the crossing in safety, was justified, in the exercise of ordinary care, in attempting it without again looking. It was reversible error to give the instruction.

4. The first and second instructions are copies of detached sentences to be found in the opinion of this court in the case of Shea *v.* Railway Co., 50 Minn. 395, 52 N. W. 902. Counsel for respondent seems to assume without argument that because the propositions, when read in connection with their context in an opinion and the question then under consideration, are correct, the action of the trial court in giving them as unqualified rules of law for the guidance of the jury in this case will be sustained. The mere reading of the opinion is a sufficient answer to the suggestion. The third instruction is a copy of a part of the syllabus to the case of Watson *v.* Railway Co., 53 Minn. 551, 55 N. W. 742, and, as applied to the facts of that case, it was correct, but, as a general legal proposition, it is not. As there must be a new trial in this case for the errors indicated, it is unnecessary to consider the other questions presented by the record. Order reversed, and a new trial granted.

CHESTER TRACTION CO. *et al.*

v.

PHILADELPHIA, W. & B. R. Co.

(*Supreme Court of Pennsylvania, Oct. 17, 1898.*)

Right of Railroad to Prevent Street-Railway from Crossing Its Tracks in Street at Grade.*—A steam railroad company, occupying a city street with its tracks under its charter, should not be enjoined from resisting the attempt of a street-railway company to cross such street with its tracks at grade under a subsequent grant, where it appears from the evidence that the trains of the railroad company pass such point every few minutes; that overhead crossings are constructed upon similar ground in a neighboring city; and that, prac-

*See notes at end of case.

tically, the only inconvenience the necessity of constructing an overhead crossing would cause the street-railway company, would be the additional expense; it appearing therefrom that an overhead crossing is reasonably practical, and that no "imperious necessity" demands a grade crossing at such point.

Appeal by defendant from Delaware county court of common pleas. *Reversed.*

J. B. Hannum, for appellant.

W. B. Broomall, for appellees.

DEAN, J. The city of Chester, fronting on the Delaware river, has a population of about 25,000. Beginning at or near the river, about 45 streets run north, intersecting other streets and avenues running east and west. The Philadelphia, Wilmington & Baltimore steam railroad crosses the city at grade from east to west, and therefore is crossed by all the north and south streets of the city,—among them, Welsh street. For many years the railroad company maintained two tracks through the city, and at the commencement of these proceedings was constructing and about to lay down the rails on two more. By ordinances duly enacted, the city granted to the Union Railway Company the right to occupy with its railway certain streets, among them, Welsh street from Fourth to Sixth. Afterwards the Chester Traction Company became the lessee of the Union, and claimed all the rights and privileges of the lessor company. It attempted, under the consent of the city, theretofore granted, to lay its tracks on Welsh street, thereby crossing the steam railroad at grade. The latter resisted, and thereupon the plaintiffs filed this bill to enjoin defendant from any interference. The bill averred its charter and lease, the consent of the city, and the necessity of the grade crossing in conducting its business in accordance with the terms of its charter. The defendant denied the legal right of the Chester Traction Company, under its grant, to occupy the street at all; further, denied that it was a necessity to the company to cross at grade at that point. After full hearing, the court below, in opinion filed, ruled in favor of plaintiffs in the issue on both points, and directed an injunction to issue. From that decree we have this appeal by defendant, assigning for error the finding of fact and conclusions of law by the court below.

Case Stated.

Without at present noticing the assignment averring an

absence of corporate right to lay its rails, by reason of the facts on which the charter was founded, not existing at the date of the grant, we take up the one averring there is no necessity for the crossing of Welsh street at grade. The learned judge of the court below says : "We also find as a fact, admitted by the respondent, that there is no other practicable manner by which the railway can cross the railroad at Welsh street, except at grade. We also find that the proposed crossing is imperatively demanded and required by public convenience, and is necessary to relieve the congestion of public travel at the railway crossing at Market street, one square of about three hundred and ninety-five feet south of Welsh street." So far as we can discover in the record, there is no such admission by defendant. It is possible, counsel for defendant (although the record does not show it) made such admission at the hearing, or in the argument in the court below. If so, he made no such admission before us ; on the contrary, based his argument, in large measure, on a denial of these facts. The averments in the answer to the bill are as follows : "* * * Further, that, admitting that there is no other practicable manner by which the railway of the plaintiff can cross the tracks of the defendant at Welsh street except at grade, yet the defendant avers that there are other practicable methods by which the said railway company can cross the tracks of the said defendant at other points, where the danger of the grade crossing at this particular locality might be avoided. Said defendant, however, denies that there is no other practicable mode by which the railway of the plaintiff can be constructed on Welsh street, and avers that the said railway can be constructed to cross the tracks of the said defendant either above or below grade." This is not, to our minds, an admission of the fact,but an assumption of it for the sake of the argument, and then an attempt to demonstrate that, even if such facts existed, there ought not to be a grade crossing at that point, because such crossing was not necessary to the transaction of the company's business. Let us examine first the facts which should deter these parties from constructing a grade crossing at this point. One hundred scheduled passenger trains pass daily on the steam road. This would be an average of one every 14 minutes of the 24 hours. No witness will undertake to give the number of freight trains, because they run irregularly; but on a main line between two such cities as Philadelphia and Baltimore the number must be

very great, and possibly equals that of passenger trains. The use of this particular part of the track is great, because of the location of defendant's freight warehouse near it, thus necessitating the cutting out and shifting of cars from trains. The view of the approaches of Welsh street from the steam railroad is obstructed, because of buildings on the sides of the streets. As to the extent of the use that would be made of the electric road at the crossings, we adopt the statement of its president, Mr. Lindsey. He says the purpose of the Welsh street crossing is to lessen the heavy traffic on Market street crossing, over which all the cars of all the companies now cross, except one line, which crosses at Morton avenue; that pretty close to 3,000,000 passengers are carried over the Market street crossing yearly. But one conclusion can reasonably be formed from these undisputed facts. A grade crossing is highly dangerous to the traveling public on both roads. All precautions taken to avoid danger serve only to lessen it. The millions of passengers on the two roads are at the risk of the few railroad servants who have charge of them. Recklessness, negligence, indifference, or dullness on part of the servant will still endanger life and limb of the passenger. While we are writing this opinion we have the news of the Cohoes accident, where the steam road was crossed at grade by the electric. Every passenger in the electric car goes into one or the other of the two classes, of 16 killed and 17 injured. The servants of each system attribute the accident to the negligence of those of the other. Increasing the number of crossings only increases the danger, by increasing the chances for collision. That this crossing is especially perilous follows, because of the frequent use of that particular spot of ground by both roads.

This brings before us the second section of the act of June 19, 1871: "If in the judgment of such court it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade." The meaning of this, as we decide in Perry Co. Railroad Extension Co. *v.* Newport & S. V. R. Co., 150 Pa. St. 193, 24 Atl. 709, is that the day of grade crossings is past, and they ought not to be permitted, except in case of imperious necessity. It is said by PAXSON, C. J., in that case, that in the earlier period of railroad construction the desire of the people for railroads tended to close their eyes to the danger. The traffic was light, and trains ran at long intervals. But "the rapid development of the country, the enormous growth in wealth, population, and

business, has materially changed the relations of railroads to each other and the public." In every case which has come before this court since (Pennsylvania R. Co. *v.* Braddock Electric Ry. Co., 153 Pa. St. 116, 25 Atl. 780; Altoona & P. C. R. Co. *v.* Tyrone & C. R. R., 160 Pa. St. 623, 28 Atl. 997; Scranton & P. Traction Co. *v.* Delaware & H. Canal Co., 180 Pa. St. 636, 37 Atl. 122; and others), we have strictly adhered to this construction of the act. And we have further held that what was reasonably practicable was not to be determined by the financial ability of the road seeking to cross, but by the physical practicability of avoiding the grade crossing. The plaintiff has shown by competent witnesses that the expense, approximately, of avoiding this grade crossing by one overhead, would be from $150,000 to $200,000, while the entire capital stock of the corporation is but $500,000. But the fiancial inability of the company is not a test to determine whether an improvement to carry safely 3,000,000 passengers is reasonably practicable; otherwise, the poorer the company, the more unlimited its right to interfere with the exercise by the older company of its franchise, and the more freely can it disregard the safety of the traveling public. A corporation which undertakes to carry safely 3,000,000 passengers should provide a capital sufficient to build a superstructure which will not subject this multitude to avoidable risk at a crossing. The city of Philadelphia is built on low, flat ground, probably not essentially different from that on which Chester city is located. The same Delaware river washes its eastern boundary. Yet it avoids grade crossings—not one or two, but dozens of them—by over or under structures. True, the expense is very great, and very much greater than if the grade crossings had never been permitted; but the fact that two steam roads reach the very center of the city, and that every street on their route will soon cross under or over them, demonstrates that it is reasonably practicable to avoid them under the most unfavorable circumstances. We think, on the undisputed facts, proven by the plaintiffs themselves, an overhead crossing was reasonably practicable, and the court below should have so found.

But the plaintiff has already two grade crossings,—one at Market and one at Potter street. By the increase of the city's population and business there has been a great increase of travel. As a consequence, the two grade crossings are not of sufficient capacity to enable the electric railway to

quickly move its cars. But that does not constitute "imperious necessity." Grade crossings are not to be established to promote the mere convenience of the railroad seeking to cross. The older company still has some rights under its charter, and the presumption always is that, as between senior and junior grants, the legislature did not intend that the later should interfere with the older. The legislature, by giving the right to cross at grade, could not have intended to seriously disturb or destroy the older franchise. Yet the able counsel for appellees does not shrink from the inevitable conclusion which follows his premise, for we quote the exact language of his argument: "As the population of Chester increases, and the travel upon these street railways increase, it is necessary to have additional facilities in crossing appellant's railroad. This railroad runs through the middle of Chester. The lines which have been built, extending to the upper part of the city, and extending also to the boroughs of Upland, Media, and Darby, require additional means of crossing this railroad. It is to provide for this increased traffic that the crossing at this point [Edgmont avenue], and the crossing at Welsh street, a square eastwardly from this point, has been proposed." That is, as travel increases on the electric railways, the number of grade crossings will be limited only by the action of city councils. Eventually there might be 45,—one for every north and south street. But, stimulated by like causes, travel and traffic on the steam roads would also increase, and we would have the result of two railways wanting to occupy the same narrow strip across the city at the same time almost every minute of the day. Nor does the fact that heavy damages may be exacted by the passenger as a penalty for neglect to carry safely have much weight in the determination of the question. Admit that a collision would cost one or the other company, or both, a heavy sum. That would mean a loss of dividends to the company, and a loss of life or limbs to the traveling public. The risks are not equal, and humanity shrinks from offsetting the one against the other. Besides, by unnecessarily crossing at grade, the older corporation has imposed upon it a heavier burden than that which, in strictness, was incident to its grant. In addition to its obligation to carry safely on its own contract, it must be watchful that it does not injure those of the public carried by another corporation across its roadbed. It cannot be maintained that such results as we have mentioned would

not seriously impair the value of the older franchise. We appreciate fully the difficulties of the situation. The electric railway, for the successful prosecution of its growing business, demands increased facilities for conducting it. If these facilities are to be obtained by additional inexpensive grade crossings, it not only largely increases the peril of the public, but seriously obstructs the older company in the exercise of its franchise rights. Proper overhead crossings involve an increase of capital stock, on which, probably, there could be no returns without increased fares to the public, or a construction out of gross receipts, which means indefinite postponement of dividends to the present share-holders. But the difficulty is not the creation of either corporation. The demands of the public have simply outgrown anything that could have been foreseen when the charters were granted, and when the exercise of their franchises was regulated by law. While every one admits that existing grade crossings ought to be abolished, and no further ones, except in the rarest cases, permitted, the existing legislation does not provide means equitably adequate to the end. More than once this court has called attention to the necessity of such legislation; but nothing has been added to the provisions of the act of 1871, which, as a solution of the difficulty, is, in effect, a mandate to the courts to prohibit grade crossings, unless over or under ones are physically impracticable, and unless crossings be an imperious necessity. The courts have no power to determine exactly how they shall be avoided, or to equitably apportion the expense among those interested, as under the New York statute lately adopted. So we must administer law as we find it, and not as we think it ought to be. We are of opinion the decree, on both grounds, should be reversed. First, an overhead crossing is reasonably practical; second, no imperious necessity demanding additional crossings is shown.

As to the question raised from the fact that the Chester Street-Railway Company, under a prior grant, had already laid a track upon Second street, when the Union Railway obtained its charter for a route on the same street, in violation of the law of its creation, we do not pass upon it here. The case is ruled on the other questions. And while we do not doubt our authority, in a collateral proceeding. to pass upon the question as to whether the charter of the Union is wholly nugatory, we see no reason why we should unnecessarily exercise that authority in this

case. The decree of the court below is reversed, and injunction dissolved, at costs of appellees.

NOTES.

Crossing of Railroads—Grade Crossings.—While a crossing at grade is not absolutely prohibited, such crossings are, as a rule, looked upon with disfavor by the law. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 6 Biss. (U. S.) 219; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16; Fitchburg R. Co. *v.* New Haven, etc., Co., 134 Mass. 547, 14 Am. & Eng. R. Cas. 95. *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387; Pittsburg, etc., R. Co. *v.* South-west Pennsylvania R. Co., 77 Pa. St. 173; Northern Cent. R. Co's Appeal, 103 Pa. St. 621; Pennsylvania R. Co.'s Appeal, 116 Pa. St. 55; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 9 Am. St. Rep. 128, 28 Am. & Eng. R. Cas. 266; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 126, 55 Am. & Eng. R. Cas. 1; Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277; Altoona, etc., Connecting R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. Rep. 409; Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 2 Pa. Dist. Rep. 774; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. Rep. 287; Delaware, etc., R. Co. *v.* Lackawanna, etc., R. Co., 3 Lack. Jur. (Pa.) 413; Baltimore, etc., R. Extension Co.'s Appeal, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; Moosic Mountain Coal Co.'s Appeal, (Pa. 1888) 13 Atl. Rep. 915. See also Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich. 645, 28 Am. & Eng. R. Cas. 280.

In the case of Pittsburg, etc., R. Co. *v.* South-west Pennsylvania R. Co., 77 Pa. St. 173, the court, by MERCUR, J., said: "The evident intendment of the statute is to discourage crossing at grade. This is a question in which the company whose road is to be crossed is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." Pennsylvania R. Co.'s Appeal, 116 Pa. St. 84.

One railroad will not be prohibited crossing another at grade when it appears that the crossing is necessary to the successful

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operation of the plaintiff's road and will not seriously interfere with the defendant's, and that the city authorities have consented to the crossing, it being on a street in an outlying portion of a city. Pennsylvania R. Co's Appeal, 116 Pa. St. 55.

Where one road was desirous of crossing another, and it was shown that an overhead crossing would change the grade of a number of streets and would cost more than five times as much as a grade crossing, it was held that under such circumstances, and in view of the fact that the crossing was visible on both roads for almost a mile, it was not practicable to avoid a grade crossing. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co. 160 Pa. St. 277.

So a right to cross at grade will not be granted when any other reasonable and practicable route can be obtained.

In re Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 55 Am. & Eng. R. Cas. 12; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 9 Am. St. Rep. 128, 28 Am. & Eng. R. Cas. 266; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 2 Pa. Dist. Rep. 774; Baltimore, etc., R. Extension Co.'s Appeal, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. Rep. 409. See also Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277.

Illinois.—In the state of Illinois it is the policy of the law to allow a new railroad to cross on the track of an old one at grade, but at the same time the legislature has clearly shown that it is intended that a railroad should not cross at grade in all instances. If a new road can, at small expense, cross at a different level the track of another road, it should be required to do so, particularly in cases where a grade crossing would jeopardize life and property. Additional expense should be apportioned between the roads. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 6 Biss. (U. S.) 219.

Pennsylvania.—The provision in the Pennsylvania Constitution of 1874 that every railroad company shall have the right "to intersect, connect with, or cross any other railroad," does not change the policy of the state as embodied in the Act of June 19, 1871, to prevent railroad crossings at grade where that is reasonably practicable. Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621.

The same constitution, art. 17, § 1, authorizing the crossing of railroads, does not declare whether the crossing shall be at grade or not; that is left to legislation and judicial decision. Pittsburg, etc., R. Co. *v.* South-west Pennsylvania R. Co., 77 Pa. St. 173. See also Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193.

Notes

By the Pa. Act of 1871 the rights of crossing railroads are secondary to those of the roads crossed, and the crossing company must show that no unnecessary injury is inflicted on the other by crossing at grade, and that such crossing cannot be reasonably avoided. The intent of the act is to discourage grade crossings involving danger to the public as well as injury to the company whose road is crossed. Pittsburg, etc., R. Co. *v.* South-west Pennsylvania R. Co., 77 Pa. St. 173.

The Pa. Act of May 14, 1889, P. L., p. 211, providing that any street railway company incorporated under that act shall have the right in its construction to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, is subject to the Act of June 19, 1871, P. L., p. 1360, giving the courts power to regulate grade crossings and directing them to prevent crossings at grade when reasonably practicable. Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, *reversing* 1 Pa. Dist. Rep. 626.

Massachusetts.—Mass. Stat. of 1872, c. 53, § 12, and c. 180, § 3, relating to railroads thereafter "constructed" crossing at grade, do not apply to a railroad corporation which prior to the passage of these statutes had located the line of its road, exercised its right of taking land for the use of its road, and incurred liability for land damages and expense in laying the roadbed, in rock excavation, in the construction of abutments for a bridge, and in the building of a long bridge at grade in the immediate vicinity of the point where it intended to cross another railroad at grade, although the railroad and the crossing at grade were not completed. Atty.-Gen. *v.* Ware River R. Co., 115 Mass. 400.

Same—Same—Presumption as to Practicability of Other Crossing.—The *prima facie* presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proving that it cannot in any particular case is on the company seeking such a crossing. Moosic Mountain Coal Co.'s Appeal, (Pa. 1888) 13 Atl. Rep. 915.

The practicability of crossings other than at grade depends almost entirely upon the circumstances of each particular case. Among the factors to be considered are the location and surroundings of the proposed crossing, the character of the roads, and the use made and intended to be made of them, the increased cost of construction and expenses of operation, the public safety and convenience, and the interest and convenience of the road intended to be crossed. Altoona, etc., Connecting R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623.

Same—Same—Jurisdiction of Courts of Equity.—In the absence of statute regulating the place and manner of crossing, courts of equity are empowered to determine the relative rights of the compa-

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nies with respect to the construction of the same. And where the rights of the public or one or the other of the intersecting lines will be materially injured, a court of equity may enjoin such crossing. Chicago, etc., R. Co. *v.* Chicago. etc., R. Co., 6 Biss. (U. S.) 219; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16; *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387; National Docks, etc., R. Co. *v.* United New Jersey R., etc., Co., 53 N. J. L. 217, 26 Am. St. Rep. 421; DuBois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1; Cornwall, etc., R. Co.'s Appeal, 125 Pa. St. 232, 11 Am. St. Rep. 889, 42 Am. & Eng. R. Cas. 233; Altoona, etc., Connecting R. Co. *v.* Tyrone, etc., R .Co., 160 Pa. St. 623, 34 W. N. C. (Pa.) 174; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. Rep. 409; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 55 Am. & Eng. R. Cas. 1; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621.

The question whether a grade crossing should be allowed cannot be determined in condemnation proceedings. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16.

Courts of equity having by statute been empowered to decide whether one railroad shall cross another at grade, and having as incident of that power the right to lay down the rules governing the use of the crossing, an agreement between two railroads relative to the use of a grade crossing will be enforced in equity by a bill for equitable relief and for an injunction against the violation of the contract. Cornwall, etc., R. Co.'s Appeal, 125 Pa. St. 232, 11 Am. St. Rep. 889, 42 Am. & Eng. R. Cas. 233; Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 4 Woods (U. S.) 360, 10 Fed. Rep. 497, 6 Am. & Eng. R. Cas. 597; Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 35 Am. & Eng. R. Cas. 263; Lynn, etc., R. Co. *v.* Boston, etc., R. Corp., 114 Mass. 88; Delaware Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. Rep. 287; Baltimore, etc., R. Extension Co.'s Appeal, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; Reynoldsville R. Co. *v.* Buffalo R. Co., 134 Pa. St. 541; DuBois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1; Perry County Extension R. Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193.

In a proceeding in equity by one railroad company to restrain another from crossing the tracks of the former at grade, the complainants cannot avail themselves of the fact that the defendants have, by their laches, allowed a third company to build its tracks over that portion of the chartered route of the defendants intended to be occupied by them after making said crossing. Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399.

The *Iowa* statute granting the right of one railroad to cross another

provides that the crossing shall be so constructed as not unnecessarily to impede the travel or transportation upon the railroad crossed.

In the case of Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 35 Am. & Eng. R. Cas. 263, it appeared that the track of the old road at the point at which it it was proposed to construct the crossing was upon a heavy grade, so that if loaded trains were stopped within two hundred feet of the crossing, as required by statute, it would be impossible to acquire sufficient momentum to ascend the grade, and that trains going the other way, being on a down grade, would be unable to stop except with great difficulty. It was shown that an under crossing could be constructed at a cost less than $15,000 in excess of the crossing at grade. The court held that the old road was entitled to an injunction against a crossing at grade, and the fact that the new company, pending the proceedings, had constructed various works at a cost of $6,000, which would become useless in case the crossing at grade was enjoined, was not sufficient reason for the refusal of the injunction.

Where two street railway companies are operating their respective roads under a franchise granted by legal authority, their tracks crossing each other at the intersection of two streets, a court of equity will not entertain a bill for injunction by one of them to restrain the other from laying a double track at the crossing, unless a case of irreparable injury is averred and proved, or other special facts showing the inadequacy of legal remedies. Highland Ave.,etc., R. Co. *v.* Birmingham Union R. Co., 93 Ala. 505, 50 Am. & Eng. R. Cas. 422.

BROWN

v.

WILMINGTON CITY RY. CO.

(*Superior Court of Delaware, June 2, 1898.*)

Collisions with Street Cars—Right to Use of Track.*—The right of a street-car company to the use of that portion of a street covered by its tracks is superior to the right of other users.

Duty of Persons Using Track.—Other users of the street must

*See White *v.* Worcester Consol. St. R. Co. (Mass.), 6 Am. & Eng. R. Cas., N. S., 110, and *notes*; Flewelling *v.* Lewiston & A. H. R. Co. (Me.), 6 Am. & Eng. R. Cas., N. S., 501, and Smith *v.* Electric Traction Co. (Penn. 1898), *ante* and *note*.

stop, and, if need be, turn out of street car tracks in the presence of danger from collision with a street car.

Same.—Persons using street railway tracks are bound to the reasonable use of all their senses for the prevention of collisions with street cars, and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances.

Effect of Contributory Negligence.—Where a collision between a vehicle drawn by horses and a street car is the result of contributory negligence on the part of the driver of the vehicle and negligence on the part of those in charge of the car, there can be no recovery against the street-car company.

Damages.—Where such a collision is the result merely of negligence on the part of the defendant company, plaintiff should be allowed such damages as will compensate him for the actual damage sustained, including the loss of the use of the horse and wagon,and expenses in doctoring the horse, according to the proof.

The defendant prayed the court to instruct as follows: "As the plaintiff approached the crossing, he was bound to stop and look or listen, if his view was obstructed, and thereby satisfy himself that he would not collide with a car in crossing the tracks; and, if he failed to stop sufficiently to look or listen, he cannot recover, for he himself was guilty of negligence producing the injury. Lyman *v.* Railroad Co., 4 Houst. 583; Ehrisman *v.* Railway Co., 150 Pa. St. 180, 24 Atl. 596; Railway Co. *v.* Chatterson, 14 Ky. Law Rep. 663; Christensen *v.* Trunk Line (Wash.) 32 Pac. 1018; Hickman *v.* Railroad Co., 47 Mo. App. 65; Wood *v.* Railway Co., 52 Mich. 402, 18 N. W. 124; McGee *v.* Railway Co., 102 Mich. 107, 60 N. W. 293; Blakeslee *v.* Railway Co. (Mich.) 63 N. W. 401; Boerth *v.* Railway Co., 87 Wis. 288, 58 N. W. 376; Carson *v.* Railway, 147 Pa. St. 219, 23 Atl. 369; Blaney *v.* Traction Co. (Pa.) 39 Atl. 294; Wheelahan *v.* Traction Co., 150 Pa. St. 187, 24 Atl. 688; Maxwell *v.* Railway Co., 1 Hardesty, 140; Higgins *v.* Railway Co., 2 Hardesty, 90; Del. Laws, vol. 12, p. 432, § 10. If the plaintiff did stop before going upon the tracks, and saw the car coming, or heard it coming, and mistakenly thought he had time to get across, but, miscalculating the distance or speed of the car, failed to get across, and was struck, he cannot have a verdict; for the accident was due to his own miscalculation, and he took his chances of the accident's occurring. Patton *v.* Traction Co., 132 Pa. St. 76, 20 Atl. 682; Belton *v.*

Baxter, 54 N. Y. 245; Clancy *v.* Railway Co., 88 Hun 496, 34 N. Y. Supp. 877."

Lilburne Chandler, for plaintiff.
Willard Saulsbury and *James Ponder*, for defendant.

Case Stated.

LORE, C. J. (charging jury). This is an action on the case, to recover compensation for injuries to the plaintiff's horse, harness, and furniture car, and losses and expenses incident thereto. The plaintiff claims that on the 31st day of July, 1897, his horse, which was harnessed to a furniture car, in care of and driven by his son, Walter Brown, while slowly and carefully passing from the foot of King street, westwardly into Front street, in this city, was run into by defendant's electric Riverview car, No. 177; that thereby the horse was thrown down, and pushed some 10 feet over the city pavement, and much injured; that the harness and furniture car were broken up, and rendered practically useless. The plaintiff claims that, at the time of the accident, his son was exercising all due care. He charges that the motorman on the electric car was not looking at his work, but back at the conductor, and was otherwise negligent and reckless; that the car was running at a high rate of speed; that the motorman saw, or by reasonable care could have seen, the plaintiff's horse and wagon in time to have stopped the car if he had seen fit to do so; that the collision and the injuries resulting therefrom were caused solely by the negligence of the defendant. The defendant, on the other hand, claims that, at the time of the accident, the said Walter Brown drove rapidly and carelessly down King street, and around and into Front street, and carelessly ran into the side of the car, when the car had practically come to a stop at the time of the collision; that the injuries complained of resulted entirely from the negligence of the said Walter Brown; that the plaintiff's son, without looking, listening, or stopping, drove rapidly into Front street, which is 25 feet wide from curb to curb, and has two tracks of the City Electric Railway Company on its bed, which are generally known as the north-bound and the south-bound tracks; whereas, if he had simply looked, he could have seen the approaching electric car, and stopped his wagon in time to have avoided the accident. You will remember the evidence in all its details bearing upon these two contentions. You are to be governed exclusively in reaching your verdict by your recollection of that evidence, and in no wise are to be

controlled by what I may have said to you in respect thereto in stating the case. Your province is to ascertain whether the injuries complained of were or were not caused by the negligence of the defendant. The plaintiff's right to recover is founded upon the negligence of the defendant; and the burden is upon the plaintiff to show such negligence to your satisfaction, by a preponderance of the evidence, or he cannot recover.

King and Front streets, in this city, are public highways. The defendant company have a right to use Front street for the operation of their electric railway, in common with other travelers and persons who may see fit to use it, on foot, on horseback, in vehicles drawn by horses, or otherwise. The public were entitled to use every part of the street. The electric cars, of necessity, could use only those parts of it covered by their tracks, inasmuch as such cars move only upon their tracks, within fixed lines. Within those lines, the right of the company is superior to that of other users, and must not be unnecessarily interfered with or obstructed. Such unobstructed use is daily becoming more and more a necessity, in meeting the needs of rapid transit and public convenience in large and growing cities. In using these highways, all persons are bound to the exercise of reasonable care, to prevent collisions and accidents. Such care must be in proportion to the danger of the peculiar risks in each case.

Collisions with Street Cars—Right to Use of Track.

It is the duty of the company to provide competent and careful motormen and servants; to see that they use reasonable care in operating the cars, that the cars move at a reasonable rate of speed, and that they slow up or stop, if need be, where danger is imminent. There is a like duty of exercising reasonable care on the part of people, who may otherwise use such highway, to stop, and, if need be, to turn out and keep out of the tracks of the cars in the presence of danger; especially as they are free to move at pleasure, and can use every part of the highway, while the cars can move only on their fixed tracks. The many people who use electric cars for business and other purposes are entitled to free and uninterrupted transit in and about our city.

Duty of Persons Using Track.

We are not prepared to lay down in this case any absolute rule as to what precise acts of precaution are necessary to be done, or left undone, by persons who may have need to cross electric city railways. Such acts necessarily must depend upon the circumstances of each

Same.

particular case. The degree of care differs in different cases. Greater care is necessary in crossing a road where the cars run at a high rate of speed and close together than where they run at less speed and remote from each other. In like manner, where the view at the crossing is obstructed or in a neighborhood where there is much noise and confusion, greater care is necessary than in places where the view is unobstructed and with quiet surroundings. In like manner, a railway is held to greater caution, in the more thronged streets of the densely populated portions of the city than in the less obstructed streets in the open or suburban parts. From these illustrations, manifestly, the care to be used depends largely upon the circumstances of each case. It would therefore be difficult, if not dangerous, to lay down any inflexible rules. The general rule upon this subject is that persons so crossing a street-railway track are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances. This rule is plain and well settled, and is to govern you in the determination of this case. The rule of the highways, requiring drivers of public or private vehicles to turn to the right when they meet, does not apply to this case; nor does the case, in our judgment, involve the law of remote and proximate cause.

Taking the rule, therefore, as we have above laid it down, it is for you now to determine whose negligence it was that caused the accident. If it was the negligence of the boy who drove the plaintiff's horse and car, only, your verdict should be for the defendant. The negligence of the boy in that case would be the negligence of the plaintiff, whose servant or agent he was in the management of the horse and wagon. Again, even though the defendant company may have been negligent on its part, yet, if the negligence of the boy contributed to and entered into the accident at the time of the injury, your verdict should be for the defendant, as the plaintiff in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party. If, on the other hand, you believe that the accident resulted from the negligence of the defendant company only, then your verdict should be for the plaintiff.

Effect of Contributory Negligence.

If your verdict should be for the plaintiff, you should

assess his damages at such sum as will reasonably compensate him for the actual injuries to his horse, harness, and furniture car, which may include the loss of the use of the horse and wagon, and expenses in doctoring the horse, according to the proof in this case. We do not consider that the law of exemplary or punitive damages is applicable to this case. Verdict for defendant.

Damages.

RITZMAN

v.

PHILADELPHIA & R. R. CO.

(*Supreme Court of Pennsylvania, July 21, 1898.*)

Accident at Crossing—Contributory Negligence Per Se.—Failure to "stop, look, and listen," before attempting to cross railroad tracks at grade is negligence *per se*, and a question of law for the court.

APPEAL by plaintiff from Northumberland county court of common pleas. *Affirmed.*

S. B. Boyer, for appellant.
S. P. Wolverton, for appellee.

PER CURIAM. On the facts admitted by the plaintiff himself, it was the plain duty of the learned trial judge to enter the compulsory nonsuit, and he was clearly right in refusing to take it off. The failure of the plaintiff to comply with the rule of law that imperatively required him to "stop, look, and listen," before attempting to cross defendant company's road at grade, was not merely evidence of negligence, but negligence *per se*, and a question of law for the court. Railroad Co. *v.* Beale, 73 Pa. St. 504; Myers *v.* Railroad Co., 150 Pa. St. 388, 24 Atl. 747; and many other cases that might be cited. The rule is unbending, and should be rigidly enforced. Judgment affirmed.

NOTES.

Failure to "Stop, Look, and Listen," at Railroad Crossings, Whether Negligence Per Se—Failure to Stop Not Negligence Per Se.—The general rule is, that a person about to cross a track must bear in

mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury. And if the traveler looked and listened, or did all that a prudent man would have done under the circumstances, it will not be said, as matter of law, that he should have stopped. Alabama G. S. R. Co. *v.* Anderson, 109 Ala. 299; Garland *v.* Chicago, etc., R. Co., 8 Ill. App. 571; Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168, 6 Am. & Eng. R. Cas. 84; Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; Union R. Co. *v.* State, 72 Md. 153; Tyler *v.* New York, etc., R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 32 Am. St. Rep. 540; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; Donohue *v.* St. Louis, etc., R. Co., 91 Mo. 357, 28 Am. & Eng. R. Cas. 673; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618; Dolan *v.* Delaware, etc., Canal Co., 71 N. Y. 285; Kellogg *v.* New York Cent., etc., R. Co., 79 N. Y. 72; Enders *v.* Lake Shore, etc., R. Co., (Buffalo Super. Ct.) 2 N. Y. Supp. 719; Manley *v.* Delaware, etc., Canal Co., 69 Vt. 104, *citing* 4 Am. & Eng. Encyc. of Law (1st ed.), p. 68; Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606; Peart *v.* Grand Trunk R. Co., 10 Ont. App. 191.

Pennsylvania Rule.—"There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court." SHARSWOOD, J., in Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60, 88 Am. Dec. 482.

Failure to "Stop, Look, and Listen", Not Negligence Per Se.—A failure to stop, look, and listen will not be held negligence when the circumstances were such that an observance of these precautions would have been unavailing as a guard against injury. Fordham *v.* London, etc., R. Co., L. R. 3 C. P. 368; Stubley *v.* London, etc., R. Co., L. R. 1 Exch. 13; Continental Imp. Co. *v.* Stead, 95 U. S. 161; St. Louis, etc., R. Co. *v.* Amos, 54 Ark. 159; Pennsylvania Co. *v.* Rudel, 100 Ill. 603, 6 Am. & Eng. R. Cas. 30; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 406, 25 Am. & Eng. R. Cas. 550; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253; Laverenz *v.* Chicago, etc., R. Co., 56 Iowa 689, 6 Am. & Eng. R. Cas. 274; Carlin *v.* Chicago, etc., R. Co., 37 Iowa 316; Benton *v.* Central R. Co., 42 Iowa 192; Artz *v.* Chicago, etc., R. Co., 35 Iowa 153; Herlisch *v.* Louisville, etc., R. Co., 44 La. Ann. 280; Webb *v.* Portland, etc., R. Co., 57 Me. 117; Com. *v.* Fitch-

Notes

burg R. Co., 10 Allen (Mass.) 189; Craig *v.* New York, etc., R. Co., 118 Mass. 431; French *v.* Taunton Branch R. Co., 116 Mass. 537; Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445; Johnson *v.* Hudson River R. Co., 20 N. Y. 66, 75 Am. Dec. 375; Terry *v.* Jewett, 78 N. Y. 338; Warfield *v.* New York, etc., R. Co., 8 N. Y. App. Div. 479; Brassell *v.* New York Cent., etc., R. Co., 84 N. Y. 241; Cleveland, etc., R. Co. *v.* Schneider, 45 Ohio St. 678; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322; Butler *v.* Milwaukee, etc., R. Co., 28 Wis. 487; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304. See also Louisville, N. A. & C. Ry. Co. *v.* Patchen (Ill. 1897), 10 Am. & Eng. R. Cas., N. S., 852, and *note*, 856; McCanna *v.* New England R. Co. (R. I. 1898), *id.*, 485, and *note*, 489 *et seq.*, and 7 *id.*, *note*, 562. Hence a failure to stop, look, and listen is not contributory negligence *per se*. Grand Rapids, etc., R. Co. *v.* Cox, 8 Ind. App. 29; Cincinnati, etc., R. Co. *v.* Grames, 8 Ind. App. 112; Reed *v.* Chicago, etc., R. Co., 74 Iowa 188; Gratiot *v.* Missouri Pac. R. Co., (Mo. 1891) 19 S. W. Rep. 31; Neudoerffer *v.* Brooklyn Heights R. Co., 9 N. Y. App. Div. 66; Davis *v.* New York Cent., etc., R. Co., 47 N. Y. 400; McBride *v.* Northern Pac. R. Co., 19 Oregon 64; Gulf, etc., R. Co. *v.* Greenlee, 70 Tex. 553; Olsen *v.* Oregon Short Line, etc., R. Co., 9 Utah 129; Smith *v.* Rio Grande Western R. Co., 9 Utah 141.

Pennsylvania Rule.—In some jurisdictions, however, it is held that a failure to stop, look, and listen, before entering upon a railway track, is not merely evidence of negligence, but negligence *per se*, and, as such, will bar a recovery, unless it affirmatively appears that it did not proximately contribute to the injury. Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262; Denver, etc., R. Co. *v.* Ryan, 17 Colo. 98; Cincinnati, etc., R. Co. *v.* Duncan, 143 Ind. 524; Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159; Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157, 18 Am. Rep. 407; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Pennsylvania Canal Co. *v.* Bentley, 66 Pa. St. 30; Seamans *v.* Delaware, etc., R. Co., 174 Pa. St. 421; Smith *v.* Philadelphia, etc., R. Co., 160 Pa. St. 117.

When the Pennsylvania Rule Does not Govern.—It should not be overlooked that the *Pennsylvania* rule, that a failure to stop, look, and listen is negligence *per se*, has no application to a case where the failure to stop, look, and listen was not a proximate cause of a subsequent injury. Thus when the plaintiff drove on a crossing without stopping to look or listen, but would have crossed in safety if his horse's foot had not become fast by reason of a defect in the crossing, and his horse and vehicle were injured several min-

utes later by the negligent management of a train, while he was trying to extricate his horse's foot from the crossing, it was held that the failure to stop, look, and listen did not contribute to the injury, and would not bar a recovery. Baughman *v.* Shenango, etc., R. Co., 92 Pa. St. 335, 6 Am. & Eng. R. Cas. 51, 37 Am. Rep. 690.

But where it does not thus affirmatively appear that the failure to stop, look, and listen was not a proximate cause of the injury, it seems that in Pennsylvania and other states holding such failure negligence *per se*, it will be presumed to have contributed to the injury. Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep. 159; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161; Toledo, etc., R. Co. *v.* Cline, 135 Ill. 41, 45 Am. & Eng. R. Cas. 150; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 59 Am. Rep 159; Magner *v.* Truesdale, 53 Minn. 436; Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 45 Am. & Eng. R. Cas. 163; Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, 13 Am. Rep. 753; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610; Central R. Co. *v.* Feller, 84 Pa. St. 226; Pennsylvania R. Co. *v.* Ackerman, 74 Pa. St. 265; Phillips *v.* Milwaukee, etc., R. Co., 77 Wis. 349.

Bond

v.

Lake Shore & M. S. Ry. Co.

(*Supreme Court of Michigan, July 18, 1898.*)

Accident at Crossing—Failure to Stop and Listen.*—Where it appears that plaintiff's injuries were the result of a failure on her part to stop and listen before attempting to drive across defendant's track at a public crossing, with which she was familiar, a verdict in her favor should be reversed.

Conflict in Testimony.—Plaintiff claimed, in such action, that her view of the track was obstructed, but her evidence on the subject

*As to Duty to Stop, Look and Listen, see Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante* and *note*; McCanna *v.* New England R. Co. (R. I.), 10 Am. & Eng. R. Cas., N. S., 485, and *note*, p. 489; Central R. Co. *v.* Smalley (N. J.), 10 Am. & Eng. R. Cas., N. S., 463, and *note*, p. 467.

was not positive, and several other witnesses testified positively to the contrary. *Held*, that there was not such a conflict of testimony on the question as to warrant its submission to the jury.

Same.—In such action there was not such a conflict in testimony on the question as to whether or not certain signals were given as to warrant its submission to the jury.

ERROR by defendant to Washtenaw county circuit court. *Reversed.*

Case Stated.

Plaintiff claims that while she was riding south from Ann Arbor, in a public highway, her carriage was struck by the engine of a freight train going west on the defendant's road. The accident happened September 22, 1894, and she commenced this action August 19, 1896. She recovered verdict and judgment. She was 66 years old, was alone, and driving with one horse and a covered buggy. The curtains were closed. She claims that she was ignorant of the approach of the train until she heard the alarm whistle and saw the approaching train; that she was then so near the track that she did not dare to stop, and therefore whipped her horse in an attempt to get across. Her buggy was overturned in a ditch from 20 to 40 feet from the track. The Ann Arbor Railroad crosses the defendant's road, 2,523½ feet east of the highway, at a place called "Pittsfield Junction." The highway runs nearly north and south. The railroad runs southwesterly. A small one-story house and barn, owned by a Mr. Ukle, were situated near the corner, upon the land between the railroad right of way and the highway. The house was to the south of the barn, and the distance from the house to the track was about 200 feet.

C. E. Weaver (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

Lehman Bros. & Stivers, for appellee.

GRANT, C. J. (after stating the facts). 1. Plaintiff was guilty of contributory negligence, under her own testimony.

Accident at Crossing—Failure to Stop and Listen.

She had lived for 15 years a short distance south of this crossing, and crossed it many times, and was entirely familiar with the situation. She was partially deaf in her left ear, which was towards the east, the direction from which the train was approaching. In a written statement, made a few weeks after the accident, she said that she was entirely deaf

in that ear. When plaintiff reached a point near Mr. Ukle's house, she heard a train at the east which she supposed was on the Ann Arbor road. She knew that a freight train on the defendant's road was due some time before she reached the crossing. She thought it had gone, but in fact it was behind time. She testified that she slowed the speed of her horse, but did not stop to listen; that she looked through an opening three or four inches wide between the top of the curtain and the covering above; that she leaned forward and looked, and that she listened. She thought there must have been some small trees or something growing on defendant's right of way beside the fence, because she could not see the track. Plaintiff had no means of determining whether the train she heard was on the defendant's road or the Ann Arbor road. Aside from the fact that a railroad crossing is of itself warning of danger, she was further warned by the noise of a train which might be, and in fact was, on the defendant's road. Travelers upon a highway are charged with notice that trains are liable to pass at any time, and the law requires them to exercise the same degree of care at all times. If it were a fact that trees or bushes obstructed her view, it was her clear duty to stop and listen. It is evident, from her own statement, that she could have heard the train had she done so. On her redirect examination, she testified: "I think I heard the train at the junction start out." In her statement above referred to she said: "When I first heard the train I thought it was on the Toledo & Ann Arbor road, and the next thing I heard was the fearful whistle of the engine." She also said in that statement: "I did not stop to listen or look to see where the train was." She admits that she made the statement, that it was read to her, and that she signed it. There is no evidence of any unfairness in procuring it, or that she was not mentally competent to make and understand it. The only explanation she gives is: "I was very sick, and did not place my mind on it." She denies no part of it, except to say: "I don't think I used the language, 'I didn't stop to listen or look to see where the train was.' I have no recollection of giving him any such statement." The conclusion is irresistible that, had she stopped and listened, the accident would have been avoided.

It is also conclusively established by the evidence that there was no obstruction to her vision from the time she

passed Mr. Ukle's house until she reached the track, and that during that entire distance she could have seen the train from the time it started from Pittsfield Junction. Mr. Walker, who lived in the first house south of the track, was working in a field to the north. He came out into the road with his team about 30 rods north of the track, and saw Mrs. Bond coming 10 or 15 rods behind him. He heard the customary crossing signals, and saw the train. Said he could not help seeing it after passing to the south of Mr. Ukle's house. "From there on to the railroad there was nothing to prevent my seeing it." He testified that plaintiff was sitting on the right side of the buggy, with the curtains up. Other witnesses equally positive corroborate Mr. Walker as to the absence of obstructions to the vision, and there is no testimony to the contrary except the statement of Mrs. Bond. Upon this point her testimony is as follows: On direct examination: "Q. How close to the right of way fence, or Mr. Ukle's land, are there any bushes or shrubbery, or any thing of that kind? A. I think there must have been some. I was not very particular to notice, but I know I could not see through. Q. State whether or not, when driving along, you tried to look down towards the station. A. I tried to. Q. State whether or not there were any small trees or anything growing on defendant's right of way inside the fence. A. I think there was. Q. Why do you say that? A. Because I could not see the track." On cross examination: "Q. Then you could see down the track? A. I could not see much until I got on the track. I could not see any train until I got on the track. Could not tell how far down the track I could see. Could not see to the depot. Q. What was in the way? A. Because I was looking; I could not see. Q. Was there anything in the way between there and the depot? A. There were things growing beside the road—right of way,—I think, inside the right of way. Q. What was growing there? A. I think there were trees and shrubs there, so that I could not see. Did not see anything until the horse was on the track. I don't know as I looked all the while. I looked until I thought there was no train on the road." We think it is clear that there is no such conflict in this testimony as to justify its submission to the jury.

Conflict in Testimony.

2. Many allegations of negligence were made in the declaration, but upon the trial all were eliminated except the

failure to blow the whistle and ring the bell. Upon this point there was no real conflict in the evidence. The engineer, fireman, one brakeman, the conductor, and Mr. Walker swear positively that the whistle signals were given. The engineer, fireman, and brakeman swear positively that the bell was rung. There is nothing to impeach or weaken this testimony. The only testimony claimed to contradict it is that of the plaintiff herself, and a boy, then 10 years old, as to the whistle, and herself alone as to the ringing of the bell. Plaintiff testified that she "heard no whistle or bell or anything." It is true she testified that she was listening, but it was with at least partial deafness, in one ear, with her horse and carriage moving, herself sitting in the carriage, closed on both sides and the back, and the train approaching from the northeast and behind her. She testified on cross-examination: "Q. What was it you heard when you heard the train? A. I heard the noise it makes when it starts from the station,—the whistle. I don't know what you call it, but the noise it makes when it starts up,—a sharp tooting from the engine." She further testified: "I could not tell whether the bell was rung or not." She thus described the usual whistles for the crossing. It is not customary to blow a whistle when starting from a station. The only testimony upon this point was brought out by the cross-examination of the engineer and fireman. The engineer testified: "I do not recollect whether I sounded the whistle when I left the station. Do not make a practice of it. We ring the bell when we start, and do not use the whistle. That is my invariable practice. Do not think I whistled on this occasion. Did not whistle at all until I whistled for the highway crossing." The fireman testified that the engineer did not whistle on starting from the junction, and that it is not customary to do so. When the train started from the junction, the engine stood 15 or 16 car lengths west of the station house. It will thus be seen that there was a very short distance to go before giving the crossing whistle. It was a freight train, and would therefore move slowly at first. It is very evident that the whistle she heard was that for the crossing. The boy Ukle was at the station house when the train started, and walked after it down the track. He testified that he did not hear the whistle, but "could not tell whether it did whistle or not. I was not paying any attention to know whether it whistled or not." This was not sufficient contradiction of the testimony of the defendant to justify

Same.

its submission to the jury. Shufelt *v.* Railroad Co., 96 Mich. 327, 55 N. W. 1013, and authorities there cited; Urias *v.* Railroad Co., 152 Pa. St. 326, 25 Atl. 566; Bohan *v.* Railway Co., 61 Wis. 391, 21 N. W. 241. Many other cases might be cited holding the same rule. Judgment reversed, and new trial ordered. The other justices concurred.

RING

v.

CHICAGO, ST. P. & K. C. RY. CO.

(*Supreme Court of Iowa, May 20, 1898.*)

Accident at Crossing—Contributory Negligence as a Matter of Law.*—One who deliberately walks upon a railway track immediately in front of a rapidly moving train, that he might have seen approaching had he exercised the slightest care, is guilty of negligence as a matter of law, and the question whether the train was running within city limits at an excessive rate of speed need not be considered.

APPEAL by plaintiff from Polk county district court. *Affirmed.*

Henry S. Wilcox, for appellant.

Cummins & Wright, for appellee.

PER CURIAM. About half past 1 o'clock in the morning of April 3, 1892, plaintiff was passing along Eighth street, in the city of Des Moines, which is crossed by the track of the defendant railway. As he approached the crossing, and when about 35 feet from the track, he looked for a train, and, not perceiving any, passed on, and was just stepping on the rails when he was struck by a train which he says was running about 30 miles an hour. We need not consider the matter of defendant's negligence, for the case must be disposed of on another ground. At the point where plaintiff looked for a train, he says he could have seen the headlight of the locomotive at a distance of 500 or 600 feet. It is undisputed

*See Ritzman *v.* Philadelphia & R. R. Co. (Penn. 1898), *ante*, and *note*.

that the headlight was burning. He admits that, when he got within 20 feet of the crossing, his view of the track was unobstructed for 2,000 feet in the direction the train was approaching. There does not appear to have been anything to distract his attention. On his own statement, he deliberately walked upon the railway track immediately in front of a rapidly moving train, that he might have seen had he exercised the slightest care. This case is not so favorable in its facts for plaintiff as was Sala *v.* Railway Co., 85 Iowa, 678, 52 N. W. 664, in which, under circumstances somewhat similar, we held plaintiff to be negligent as a matter of law. There was nothing for a jury to pass upon in this case. We think the action of the trial court was right, and it will be affirmed.

CAWLEY

v.

LA CROSSE CITY RY. CO.

(*Supreme Court of Wisconsin, Nov. 1, 1898.*)

Injury to Person on Street-Railway Track—Negligence—Contributory Negligence—"Look and Listen".*—Plaintiff was traveling on the highway along defendant's street-railway track where she could have seen and heard a car approaching from behind, for several hundred feet, had she looked and listened for that purpose. She said she did look and listen but did not see or hear a car. She turned and drove onto the track for the purpose of passing a wood wagon that was going the same way she was. Before she got by the wood wagon, so as to turn to the right off the track in front of it, she was struck by a car and injured. After the accident the car stood about two car lengths from where it struck plaintiff's vehicle, and the wrecked vehicle was in the road behind the wood wagon. The motorman sounded his signal bell before and after plaintiff turned towards the track, and as soon as he observed she was going on the track he turned off the current, set the brakes, and did all that he could to stop the car. *Held*:

That there is no room on the facts to say defendant was negligent; and that the evidence conclusively shows contributory negligence of the plaintiff.

That the rule of look and listen before going upon a railway

*See Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante* and *note*.

track, whether steam or electric, is inflexible, and the non-observance of it is negligence *per se*; that it is a rule of law,—not a rule of evidence permitting a jury to say that there was or was not negligence where the duty was not performed.

Questions of Law and Fact.—Where there is any credible evidence that, under any reasonable view of it will admit of an inference either for or against the plaintiff, the rule that the proper inference to be drawn is a question for the jury should be firmly adhered to, but when the evidence is not susceptible of reasonable conflicting inferences, the motion for a nonsuit or the direction of a verdict should be granted as a right of the moving party, and that implies a judicial duty on the part of the court to decide that way.

(Syllabus by the Judge.)

APPEAL from La Crosse county circuit court. *Reversed.*

Action by Jennie Cawley against the La Crosse City Railway Company to recover compensation for personal injuries alleged to have been caused by the negligence of defendant's employees. The negligence complained of was running an electric car at a rapid rate, without ringing any bell or giving any warning of its approach. At the close of plaintiff's case there was a motion for a nonsuit on the ground that the evidence in her behalf failed to show actionable negligence and did show that plaintiff carelessly placed herself in the place of danger where she was injured, by driving on the track when a rapidly approaching car, in plain sight and hearing, was in close proximity to her. The motion was denied. At the close of the evidence there was a motion by defendant's counsel for the direction of a verdict, which was denied. After verdict for the plaintiff there was a motion for a new trial on the same grounds urged in favor of the two previous motions, which was denied. All the rulings mentioned were duly excepted to. Judgment was rendered in plaintiff's favor on the verdict, and the defendant appealed.

Case Stated.

Losey & Woodward, for appellant.
Ray S. Reid, for respondent.

MARSHALL, J. (after stating the facts). The sole question involved on the various assignments of error which we deem necessary to consider is, was there evidence, under the most favorable view that can be reasonably taken of it, to warrant a verdict for the plaintiff? If there was not, and that situation was apparent at the close of plaintiff's case, the court erred in granting the motion for a nonsuit. If such was the situa-

tion at the close of the evidence on both sides, the motion for the direction of a verdict should have been granted, and the errors in denying the two previous motions of course were repeated in failing to set the verdict aside and grant a new trial.

The circumstances of the accident, as shown conclusively by the evidence, are substantially as follows: It occurred in the early part of the evening, a little after dark, on a railway track laid on a broad, level, raised street, not crossed by any other street for a distance of about 2,400 feet. On the east side of the street were two electric railway tracks, occupying some 12 feet in width. At a safe distance west of the tracks there was a macadamized roadway about 20 feet wide, specially fitted for public travel by vehicles, and east of that for a distance of some 50 feet the street was reasonably level and smooth so that there was ample opportunity for teams to pass each other by night or day without driving on to the railway tracks. Plaintiff, while proceeding north, riding in a phaeton drawn by one horse, traveling on the macadamized roadway behind a heavy wood wagon, turned to the left and drove onto the railway track for the purpose of passing such wagon. The reason given for driving to the left instead of to the right was that plaintiff deemed the latter a little rough so that had she turned that way, the parcels she had in the phaeton were liable to fall out. She drove at quite a brisk trot as she turned to the left and drove onto the railway track. She had proceeded, in endeavoring to pass the wood wagon, but a short distance when she was run into by a car going in the same direction. That caused the injury. She said, she looked and listened for a car before driving onto the track, but did not see or hear any. The car was in perfect condition, being supplied with all the customary appliances, such as a brake, a suitable headlight and a signal bell. It was running at a lawful rate of speed and the motorman was at his post, keeping a sharp lookout ahead. As he approached the teams driving along at the right of the track, and before plaintiff turned towards the track, he sounded his signal bell. As soon as he observed the movement of the horse towards the track he sounded the bell, and immediately turned off the current and did all that was in his power by applying the brake, to stop the car. It nevertheless ran into the plaintiff's phaeton, throwing it off the track to the right, plaintiff at the same time falling out of the phaeton to the

left. After the collision the car went about two or three car lengths and stopped. The wrecked phaeton was then found in the roadway behind the wood wagon.

We search in vain in the foregoing to find any support whatever for the charge of negligence contained in the complaint. In view of that, upon what theory the learned trial judge submitted the case to the jury we are unable readily to perceive. Without any evidence whatever to sustain the charge of negligence made in the complaint, but on the contrary, in the face of evidence showing that everything was done to guard against all dangers reasonably to have been apprehended respecting the personal safety of plaintiff as she was traveling on the road along the street-car track, and to warn her off the track when she turned to the left, and to avoid injuring her after she entered upon the track, it was left to the jury to say whether defendant was culpably negligent or not, as if negligence under the circumstances were a disputed question of fact. The rule seems to have been overlooked that when the evidentiary facts are all undisputed and there is only room for one reasonable inference as to the ultimate fact in issue, it is for the court to draw the proper inference as a matter of law. There does not appear to be a scintilla of evidence tending to show negligence on the part of defendant. The only evidence in that regard, claimed by respondent's counsel, is that the motorman did not use reasonable diligence after he saw, or might have seen, the plaintiff turn towards the track. That is predicated solely on the theory that plaintiff's testimony shows, or tends to show, that she traveled the distance requisite to pass two or three teams before she was struck by the car. A careful examination of her evidence leads to the conclusion that the jury were not warranted in saying from it that plaintiff passed more than one team before the accident, while the undisputed fact in the case, that the wrecked phaeton was found immediately after the accident behind the wood wagon, shows that it must have been struck very soon after the horse turned in upon the track and before it had time to pass such wagon far enough to turn to the right ahead of it. It is easy to see how plaintiff might have been mistaken in view of the very uncertain nature of her evidence, and her interest in the result of the trial; but the undisputed fact as to the location of the wrecked phaeton with reference to the wood wagon, leaves no room for a reasonable belief other than that plaintiff had not passed fully by that wagon before the car reached her. All the

evidence and all reasonable inferences therefrom are consistent with that theory, and with no other; so if there were anything in plaintiff's evidence, standing alone, tending to show that she had passed two or three teams before, and we say there is not, the rule of law often announced, that the testimony of an interested party contrary to the facts otherwise conclusively established in the case and all reasonable inferences from the situation disclosed by the evidence, does not raise a conflict requiring a finding by the jury. Flaherty v. Harrison (Wis.) 74 N. W. 360; Badger v. Cotton Mills, 95 Wis. 599, 70 N. W. 687.

So it follows, as before stated, that on the question of defendant's fault there was not only no evidence tending to establish the allegations of the complaint, but the evidence affirmatively established the contrary. The failure, therefore, to grant the nonsuit and to direct a verdict for defendant, and to set aside the verdict and grant a new trial, are errors too plain to require more to make them apparent then a mere statement of the facts established by the evidence.

Injury to Person on Street Railway Track—Negligence—Contributory Negligence.

But, if it were not for the failure to establish negligence of the defendant, plaintiff could not recover on account of her contributory negligence, which appears as a matter of law from the undisputed facts. The situation was such that it was plaintiff's duty, in the exercise of ordinary care, to look and listen before going upon the track. That is conceded. The court so instructed the jury in the following language: "It is negligence as a matter of law for a person to drive upon the track of an electric railway without looking or listening for approaching cars;" and again, "If you find from the evidence that plaintiff went onto the railway track without looking carefully down the track for cars, then your verdict must be for defendant." The effect of these instructions, obviously intended, was that if the plaintiff knew, or might have known by the use of her senses of seeing and hearing, that a car was approaching in dangerous proximity when she drove upon the track, she was guilty of contributory negligence, precluding a recovery. That is the law respecting the duty of persons to avoid danger from injury upon electric railway tracks, as well as upon steam railway tracks, as is abundantly shown by cases cited in appellant's brief. Young v. Railroad Co. (Ind. Sup.) 44 N. E. 927; Everett v. Railway Co., 115 Cal. 105, 43 Pac. 207, and 46 Pac. 889; Hall v. Railroad Co. (Mass.) 47 N .E. 124. See, also, Omslaer v.

Traction Co., 168 Pa. St. 519, 32 Atl. 50; Flanagan *v.* Railway Co., 163 Pa. St. 102, 29 Atl. 743; Henderson *v.* Railway Co. (Mich.) 74 N. W. 525; Blaney *v.* Traction Co. (Pa. Sup.) 39 Atl. 294; McQuade *v.* Railway Co., 17 Misc. Rep. 154, 39 N. Y. Supp. 335; Booth, St. Ry. Law, §§ 311, 312; Kane *v.* Railway Co., 181 Pa. St. 53, 37 Atl. 110. In Omslaer *v.* Traction Co., *supra*, it is said that the rule of "look and listen" before attempting to cross the tracks of a steam railroad is inflexible, and that the nonobservance of it is negligence *per se*. The rule is just as applicable to the crossing of a street-railway track operated by a cable or electricity, and we need not go outside of our own court to find that extension of it. In Johnson *v.* Railway Co., 91 Wis. 233, 64 N. W. 753, the present chief justice said, in effect, that if a person drive upon a street-railway track without looking for approaching cars, and receive an injury, and the facts in that regard appear conclusively in a subsequent action by the injured party against the railway company for damages, it is the duty of the court to nonsuit the plaintiff or direct a verdict in favor of the defendant.

The theory upon which the court sent this case to the jury on the subject of contributory negligence manifestly was that, conceding the rule of law requiring plaintiff to look and listen, her testimony that she did so was sufficient to require the jury to find where the trouble lay, as if it were permitted to them to say on such evidence that she did in fact look and listen, and yet did not see or hear the car that was unquestionably in plain sight and hearing. In that there was a failure to observe the limits beyond which a jury cannot go. They cannot go beyond the boundary of reasonable probabilities in determining facts from evidence without going into the realms of conjecture or perversity. This court has often held that the rule of law that requires a person to look and listen before going upon a railway track, requires him to see and hear an approaching car if it is so located as to be plainly within view and hearing; that evidence of a person so circumstanced, that he looked but did not see, or listened yet did not hear the car, if believed at all, is only to establish contributory negligence by showing that he knowingly placed himself in a place of danger. Groesbeck *v.* Railway Co., 93 Wis. 505, 67 N. W. 1120; Schneider *v.* Railway Co. (Wis.) 75 N. W. 169; Steinhofel *v.* Railway Co., 92 Wis. 123, 65 N. W. 852; Haetsch *v.* Railway Co., 87 Wis. 304, 58 N. W. 393. In Burke *v.* Railroad Co., 73 Hun, 32, 25 N. Y. Supp.

1009, the court said, if a person looks he is supposed to do so for the purpose of seeing, and if the object is in plain sight and he apparently looks but does not see it, it is manifest that he does not do what he appears to do and has not complied with the rules of law. On the same subject in Young *v.* Railroad Co. (Ind. Sup.) 44 N. E. 927, the court, by MR. JUSTICE MCCABE, stated the rule thus: "If a traveler by looking could have seen the approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or if he did look that he did not heed what he saw. Such conduct is negligence *per se*." And again, the same court, in Cones *v.* Railway Co., 114 Ind. 328, 16 N. E. 638, further emphasizing the rule as one of law, said: "The law will presume that he saw what he could have seen if he had looked, and heard what he could have heard if he had listened." In Blaney *v.* Traction Co., *supra*, the supreme court of Pennsylvania used language quite as strong, as witness the following: "When a person places himself in danger, and is struck by a car on a road that is in plain sight and hearing, the unavoidable inference is that he did not look for a car when ordinary intelligence and prudence disclosed that there might be one, or, seeing one perilously near him, placed himself in its way."

So we may say that the duty is absolute to look and listen before going upon either a steam railroad track or an electric street railway track, and to see and hear an approaching car if within plain view and hearing, to a person exercising his senses of hearing and seeing with ordinary prudence, to detect it, having regard for the dangers reasonably to be apprehended, and that failure to perform that duty, or, after performing it, to keep out of the region of danger, is negligence *per se*; that it is not a mere rule of evidence which a jury may be permitted to consider, and say there was or was not negligence in a given case, according to their notions, but that it is a rule of law to be applied by the court when the facts are undisputed, and by the jury under the direction of the court when the facts are disputed. Thus far, at least, the law of negligence has proceeded in the natural process of development, through the wisdom of courts in adapting old principles to new conditions brought about by the means of rapid transit through populous districts, demanded by the times, and the dangers incident thereto, and the mutual obligations of the various mem-

Same—"Look and Listen."

bers of the community to shape their conduct with reference to the circumstances surrounding them, and administering daily to their comfort, prosperity and happiness. The bench and bar, and litigants as well, will partake of benefits that unquestionably flow from having definite and certain rules of law so far as practicable on this most important branch of jurisprudence recognized and enforced.

Candor compels us to say that in this case the learned trial court appears to have shifted a duty onto the jury which was plainly judicial, and when they failed to discharge it properly, allowed the result to stand as the law of the case. The jury did not find the fact because there was no controversy in that regard. They said that the conduct on the part of defendant was actionable negligence, and conduct on the part of plaintiff was consistent with ordinary care, when the proper application of well-settled rules of law would have led to a contrary result.

Questions of Law and Fact.

The peculiar circumstances of this case move us to reiterate what has often before been said by this court, that though the rule that where there is any credible evidence which, under any reasonable view of it will sustain a recovery, and there is opposing evidence, it is for the jury to say where the truth lies, should be firmly adhered to, where the evidence is clearly susceptible of only one reasonable inference, the motion for a nonsuit, or the direction of a verdict accordingly; should be granted as a matter of right, which implies a judicial duty to decide that way, and not to abrogate the judicial function and shift it onto the jury. Finkelston *v.* Railway Co., 94 Wis. 270, 68 N. W. 1005. A proper administration of justice requires that such a situation should be met, and the duty involved be discharged as contemplated by our judicial system, just as much as that the province of the jury to decide the facts from the evidence, where there is any conflict in that regard, should not be invaded by the court. The scope of judicial duty, and of that of the jury as well, is clearly marked, and a failure to maintain the integrity and inviolability of either is subversive to the system itself, and tends to throw doubt upon its efficacy to secure the highest attainable degree of justice between individuals, and to promote the ends of good government.

The judgment of the circuit court is reversed and the cause remanded for a new trial.

BLACKBURN

v.

SOUTHERN PAC. CO.

(*Supreme Court of Oregon, Dec. 5, 1898.*)

Accident at Crossing—Obstructed View—Duty of Drivers to Stop.*—Where it appears that deceased, without stopping his vehicle for the purpose of listening for approaching trains, attempted to drive across a railroad track in a city street, at a crossing with which he was familiar, and from which the view of approaching trains was obstructed, and was killed by a train while making such attempt, a verdict should be directed for the railroad company, although it also appears that when approaching the crossing he was driving at a slow walk, and that the train was running at an unlawful rate of speed, in violation of an ordinance of the city; a failure to stop and listen before making such attempt, under such circumstances, being negligence *per se*.

Same—Contributory Negligence Per Se.*—Though negligence is generally a question of fact for the jury, in actions for injuries at railway crossings, where the uncontradicted evidence shows the omission of a duty the law requires of the traveler, it is the duty of the court to direct for defendant.

APPEAL by defendant from Clackamas county circuit court. *Reversed.*

W. D. Fenton, for appellant.
C. D. Latourette and *W. H. Dobyns*, for respondent.

BEAN, J. This is an action to recover damages for the death of plaintiff's intestate, caused by a collision of the vehicle in which he was riding with one of defendant's trains at a street crossing in Oregon City. The ground of negligence charged in the complaint is that at the time of the collision the train was moving at a greater rate of speed than eight miles an hour, in violation of an ordinance of the city, and without ringing a bell, as required by such ordinance; and the defense is contributory

Case Stated.

*See Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante* and *note*.

negligence. Upon the issue joined, a trial was had, resulting in a verdict and judgment in favor of plaintiff for the sum of $2,000, and defendant appeals.

In answer to special interrogatories, the jury found that the speed of the train was from 10 to 12 miles an hour, but that just before the accident the bell was being rung. The defendant's negligence in running its train at an unlawful rate of speed must therefore be regarded as an established fact, and the controlling question in the case is whether the court erred in overruling defendant's motion for a nonsuit, on the ground that the evidence showed that the proximate cause of the accident was the negligence of the deceased in approaching the crossing without exercising due caution; for, if such was the fact, the plaintiff cannot recover, notwithstanding the negligence of the defendant. Schofield *v.* Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125; Railway Co. *v.* Houston, 95 U. S. 697; Railway Co. *v.* Crisman, 19 Colo. 30, 34 Pac. 286; Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119; Gothard *v.* Railroad Co., 67 Ala. 114.

The defendant's track runs north and south through Oregon City, crossing Tenth street at a slight deviation from a right angle 150 feet east of the intersection of such street with Main street. From Main street, along Tenth, to the railway track, the view of an approaching train from either direction is completely obstructed by buildings, except that on the north side, at a point 57 feet from the track, a train can be seen through an opening 2 feet wide when 137 feet from the crossing; and there is also a space of about 15 feet on the same side, between the track and the nearest building, through which the defendant claims a view of the track can be had looking north of from 90 to 157 feet, accordingly as one approaches it, but the plaintiff contends that the view through this space is obstructed by brush and trees. About 11 o'clock on the morning of July 18, 1895, the deceased and his son, a lad 16 or 17 years of age, who were returning home from Oregon City, came down Main street in an ordinary two-seated farm wagon, drawn by two horses, turned into Tenth, and, without stopping to look or listen for an approaching train, attempted to cross the track, when the wagon was struck by a train coming from the north, and the plaintiff's intestate killed. The evidence for the plaintiff tended to show that, at the time the deceased and his son turned into Tenth street, the horses were traveling in a trot, but soon thereafter, the deceased having cautioned his son,

who was driving, to look out for the cars, the latter checked them up to a walk when about halfway between Main street and the crossing, and they continued in that gait until the accident; that, as they passed along the street, both the deceased and his son looked through the opening on the north, between the buildings referred to, and listened for an approaching train, but did not see or hear it until it struck the near horse; that they were both familiar with the crossing, and saw the sign there, "Look out for the cars!" and were expecting a train about that time; but it is in proof, and it is admitted, that they did not stop their team to look or listen after turning into Tenth street.

Upon these facts, the question is presented whether the deceased, in approaching the crossing, acted with that ordinary care and circumspection which the law requires of a traveler on the highway who is about to cross a railroad track. In ordinary actions, grounded upon negligence, and in which contributory negligence is available as a defense, the general rule is that the plaintiff's conduct is to be measured by that of an ordinarily prudent and cautious person, under the same circumstances, and the question is one of fact for the jury. But, in view of the importance of railway traffic, the character and momentum of trains, and their confinement to a single track, the danger from a collision at a crossing, not only to the traveler on the highway, but to the passengers on board the train, is such that the courts have been compelled to proceed beyond the rule which ordinarily prevails, and prescribe, as a matter of law, the *quantum* of care required of a traveler about to cross a railway track. "The requirements of the law, moreover," says MR. BEACH, "proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings as affecting the traveler is no longer, as a rule, a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. It is also so consonant with right reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of

mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in the law courts. The traveler on the highway must even come to a halt for this purpose; but he is not required to get out of his wagon, and go forward on foot, for the purpose of looking, especially when such a course would not have prevented the collision, but would rather have exposed the traveler to the very peril it was designed to avoid." Beach, Contrib. Neg. (2d Ed.) §§ 180, 181. In harmony with this rule, it is a principle of law, firmly established in this state as elsewhere, that the failure of a person about to cross a railway track on a highway at grade to look and listen for an approaching train is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing. Durbin *v.* Navigation Co., 17 Or. 5, 17 Pac. 5; McBride *v.* Railroad Co., 19 Or. 64, 23 Pac. 814. In Pennsylvania and many other states the rule is pressed further, and it is the imperative duty of the party in all cases, not only to look and listen, but to stop for that purpose at a convenient distance from the track before attempting to go upon it; and, if he suffers injury from a collision with the train, his conduct in failing to stop is negligence *per se*, and must be so declared by the court. Bailey, Confl. Jud. Dec. p. 263; Railroad Co. *v.* Beale, 73 Pa. St. 504; Ehrisman *v.* Railway Co., 150 Pa. St. 180, 24 Atl. 596; Aiken *v.* Railroad Co., 130 Pa. St. 380, 18 Atl. 619. "There never was a more important principle settled," says MR. JUSTICE SHARSWOOD in Railroad Co. *v.* Beale, *supra*, "than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court. It was important, not so much to railroad companies, as to the traveling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers on trains; and they will do so again, if travelers crossing railroads are not taught their simple duty, not to themselves only, but to others. The error of submitting the question to the jury whether, if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should, upon the uncontradicted evidence, have directed a verdict for the defendants." This rule is simple, affords an unvarying standard by which the *quantum* of care required of the traveler can be determined, and, if observed, accidents at crossings

would unquestionably rarely occur. But while there is much force in the argument of MR. JUSTICE SHARSWOOD in the case referred to, that "the fact of collision shows the necessity there was of stopping," even in cases where the view of the track is unobstructed, it is probable the doctrine having the most support in the decided cases is that it cannot be affirmed as a matter of law, in all cases, that there is a duty on the traveler to stop before attempting to cross. 7 Am. & Eng. Enc. Law (2d Ed.) 430. If the view is unobstructed so that he can see an approaching train before it reaches the crossing, he has no occasion to listen, and hence it is said there is no reason why he should stop for that purpose; but if the view is obstructed, so that he cannot use the sense of sight, it then becomes his duty to listen, and to listen carefully and attentively; and if there is any noise or confusion over which he has control, either from the vehicle in which he is traveling or otherwise, which may interfere with the sense of hearing, the authorities are quite agreed that it is his duty, as a matter of law, to stop such noise, and listen for a train, before going upon the track, because he cannot listen carefully without doing so.

JUDGE ELLIOTT, in his recent work on Railroads, says that "ordinary care often requires that the traveler should stop, look, and listen for moving trains, from a place where danger can be discerned and precaution taken to avert it. If, for instance, the noise is so great that an approaching train cannot be heard, or the obstructions such that it cannot be seen, then the traveler must come to a halt and look and listen. It cannot be said that one who simply looks and listens where such acts are fruitless and unavailing exercises that degree of care which the law requires. While it cannot be justly affirmed, as we believe, as matter of law, that there is a duty to stop in all cases, yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking, and listening, and these cases, as we think, assert the true doctrine. Some of the courts, in well-reasoned cases, press the rule further, and hold that the traveler must, in all cases, stop, look, and listen. As we have said, we do not think that it can justly be affirmed, as matter of law, that there is a duty to stop in all cases; but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that where the surround-

gence in failing to stop his team to listen for an approaching train." In Shufelt *v.* Railroad Co., *supra*, the plaintiff's wife approached a railroad crossing upon a highway, in a lumber wagon drawn by two horses. A bank and woodpile obstructed the view of the track as she approached, until she reached a point 18 feet from the crossing. She was driving in a slow walk, but did not stop to look or listen for an approaching train. When the horses' feet were between the rails, she saw the train, and tried to turn them off the track, but was struck by the engine, and injured. It was held that she was guilty of such contributory negligence as would prevent a recovery, the court saying that trains must run where the view is obstructed by cuts, embankments, trees, and other things, and he who does not choose to stop and listen when he cannot see must suffer the consequences of his own negligence. Again, in Houghton *v.* Railway Co., *supra*, the plaintiff, who was returning home from his market town, riding on two boards laid upon his wagon, accompanied by his boy, approached a crossing on defendant's road at a point where his view of the track was obstructed for 196 feet from the crossing, knowing that a fast train was due about that time. He watched for the train, and listened, as did also the boy, but did not stop his team for that purpose at any point. The ground was frozen, and the wagon made some noise. As his horses stepped upon the track, he noticed the light upon them, and whipped them up, but was struck and severely injured before he got across; and it was held that his attempt to cross the track without stopping to listen for an approaching train was contributory negligence, preventing a recovery, notwithstanding the fact that other teams had immediately preceded him across the track in safety. And so, also, in Henze *v.* Railway Co., *supra*, the testimony of plaintiff's witnesses showed that the deceased, with his infant son, was driving in a two-horse wagon, at a slow walk, along a highway where it crossed the railroad, when they were run over and killed by a train, which was an extra, and not running on time. The witnesses were not agreed as to whether the deceased could have seen the train as he approached the crossing; but the testimony showed that, while no bell was rung or whistle sounded, the train made plenty of noise, and he could have heard it if he had stopped and listened; that he did not stop to look or listen, or take any other precaution to avoid the danger; and it was held that a demurrer to the evi-

Co. *v.* Smalley (N. J. Err. & App.) 39 Atl. 695; Chase *v.* Railroad Co., 78 Me. 346, 5 Atl. 771; Flemming *v.* Railroad Co., 49 Cal. 253; Shufelt *v.* Railroad Co., 96 Mich. 327, 55 N. W. 1013; Houghton *v.* Railway Co., 99 Mich. 308, 58 N. W. 314; Henze *v.* Railway Co., 71 Mo. 636; Beyel *v.* Railroad Co. (W. Va.) 12 S. E. 532.

In Railroad Co. *v.* Smalley, *supra*, the plaintiff drove, by daylight, slowly along a highway, towards a railroad crossing, looking and listening for approaching trains. His view of trains that might come from the west was cut off, notwithstanding which he drove, without stopping, upon the track; and his horse was killed, his sleigh demolished, and himself injured, by the engine of a train which, until it was upon him, he could not see, by reason of the obstruction, and did not hear. *Held*, that it was error in the trial judge to deny the motion for a nonsuit for contributory negligence. So, also, in Chase *v.* Railroad, *supra*, the evidence showed that the crossing where the deceased was injured was at the north end of a cut, and, between the cut and the highway upon which he was traveling, high land and other obstacles intervened which obstructed his view of the train coming from the south, for a considerable distance before reaching the crossing. This, the court said, made it his duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially in a sleigh with bells attached, it would be necessary to stop his horse; for, surely, he could not listen carefully and effectually without stopping his horse, and thus stilling the noise to his own team. And, because the conduct of the deceased did not come up to this standard, it was held that he was guilty of contributory negligence, such as would bar a recovery. In Flemming *v.* Railroad Co., *supra*, the plaintiff was driving a four-horse team towards a railroad crossing. The air was so filled with dust that he could not see the railroad, and his wagon made some noise. He attempted to cross the track without stopping to listen for an approaching train, and his horses were killed by the engine. It was held that he was guilty of contributory negligence, and could not recover, the court saying: "As the plaintiff could not have used his eyes with effect, it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negli-

wagon and listened, he would have heard the approaching train. Having neglected this method of informing himself, he failed, in our opinion, to use due diligence under the circumstances, and the motion for a nonsuit should have been allowed.

Same—Contributory Negligence Per Se.

It is unquestioned that negligence is generally a question of fact for the jury; but in actions for injuries at railway crossings, where, as in this case, the uncontradicted evidence shows the omission of a duty which the law requires of the traveler, it is the duty of the court to direct a verdict for the defendant. Durbin *v.* Navigation Co., 17 Or. 5, 17 Pac. 5; Elliott, R. R. § 1179. The judgment will therefore be reversed, and it is so ordered.

VANT

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Dec. 16, 1898.*)

Accident at Private Crossing*—"Stop, Look and Listen"—Excessive Speed.—There can be no recovery for the death of a person killed by a train while attempting to drive across railroad tracks without stopping to look or listen, at a private crossing within 42 rods of the limits of a city, although the train, immediately before the accident, was running within city limits at the rate of 60 miles an hour and no signals were given, where deceased should have seen the train when approaching from a distance of 94 rods before making such attempt.

APPEAL by plaintiff from Sauk county circuit court. *Affirmed.*

James A. Stone and *G. E. Roe*, for appellant.
Fish, Cary, Upham & Black, for respondent.

CASSODAY, C. J. This is an action to recover damages for the death of the plaintiff's intestate, Byron Vant, the plaintiff's minor son, who was struck by the defendant's train August 26, 1897, about 11 o'clock a. m., at a railroad crossing within the city limits of Reedsburg, and died in consequence five days afterwards. The complaint is in the usual

*See Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante*, and *note*.

form. The defendant answered by way of admissions and denials. At the close of the trial the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

The circumstances of the injury are to the effect that the defendant's track runs out of Reedsburg nearly in a northwesterly direction; that about 42 rods easterly from the west line of the city limits is a private lane, 20½ feet wide, running substantially north and south across the defendant's right of way and track, bounded by a wire fence on either side; that on the northerly line of the right of way there was, at the time, a gate 16 feet wide across the lane, which opened upon the right of way, and towards and upon the east side of the lane, and which was at the time in question open, and had been left open, for months, and extended to within from 2 to 4 feet, to a telegraph pole also standing in the right of way, and just east of the traveled track on the right of way, which was about 10 feet wide and sloped to the east and west, and ascended slightly from the gate to the rails, and the right of way on either side of the traveled track was more or less rough, and especially on the east side, where it descended from 2 to 3 feet in 36 feet at a point 10 feet north of the rail, and on the west side the descent was only about one-half as great; that from the northerly line of the right of way to the southerly line of the right of way, along the traveled track, was 106 feet, of which 54½ feet was north of the railway track; that about 60 rods east of the crossing was a deep cut, which would prevent the view of an approaching train from the east, and upon the east side of the lane, and 60 feet north of the right of way, was a dwelling house, which would obstruct the view of a train coming from the east; that on the west side of the lane, and for 20 rods north of the crossing, there was nothing to obstruct the view of an approaching train for a distance of 80 rods from the crossing, except a wire fence, and, after reaching the right of way, there was nothing to obstruct the view of an approaching train for a distance of 94 rods; that on the morning in question, and a few minutes after 11 o'clock, the deceased, and his uncle, who was about 43 years of age and of average strength and familiar with handling horses, were approaching the crossing in the lane from the north with a team and the running gear of a lumber wagon, with no box on, sitting with their faces easterly, on the hind part of the wagon, on the reach and the hounds,—perhaps on the axle-

tree,—and driving on a slow walk of from 2½ to 3 miles per hour, and when on the crossing the wagon was struck by the train due in Reedsburg at four minutes after 11 o'clock, coming from the west, throwing the horses upon the south side of the track, and the wagon, except a part of the tongue, upon the north side of the track, and the bodies of the two persons were thrown to the north side of the track, one about 25 feet, and the other about 60 feet, from the crossing; that the off horse was killed and the other was apparently unhurt. In granting the nonsuit the trial court stated, in effect, that the case must be decided wholly upon the undisputed evidence; that the evidence bearing upon the questions involved and urged, as determining the plaintiff's rights, were that the approach of this track from the north, from which direction the plaintiff's intestate was coming, was so situated with reference to the track that a train could be observed for a distance of 94 rods northwest, the direction from which the train in question was coming; that between that point and the crossing the corporate limits were fixed where the parties had a right to presume that the train would be run at the legal rate of speed; that this train must be assumed to have been running, under the testimony, at the highest rate of speed mentioned (60 miles an hour), which was negligence on the part of the defendant; that the other charge, that there were no signals given, must be a question to be submitted to the jury as to whether it would have constituted negligence or not, in view of the fact that this was a private crossing; that this was a regular passenger train, and, though a few minutes late, yet that did not relieve the public from the care which was required in attempting to cross the track when such a train was about to pass the crossing; that the rule of law established by the decision is to the effect that though there may be negligence on the part of the defendant in running trains faster than the legal rate of speed, and, though persons had a right to presume that this train would run at the regular rate of speed when it arrived at the corporate limits, yet if it also appears that the persons so attempting to make the crossing, in view of the whole situation and what was plainly before their eyes, were careless in attempting to do so if they saw the train, or were careless in not looking to see the train, then the right to recover is defeated, and no question of supervening negligence can arise to determine the rights of the parties.

The lane in question was narrow, and it is conceded that

it was not a good place for a team, approaching the crossing from the north, to turn to the east when inside of the right of way. The complaint alleges that the deceased was at the time of the injury traveling upon a street opened many years prior thereto as a private way, but which had long prior thereto ceased to be used as such, and, with the knowledge, consent, and license of the defendant, had come into very general and constant use by the public as a street for travel thereon. Such allegations were denied by the answer, and there was no attempt to prove that the lane in question constituted a public highway, and there is no pretense that it was a public highway. The most that is claimed is that it was much traveled,—more than the ordinary country highway; that during the last few years an average of 15 or 25 teams crossed the railroad daily at that crossing; and that the gates on each side of the track had been open for months. These facts, brought home to the defendant, would, undoubtedly, increase the vigilance and care required of the defendant to avoid collisions at the crossing. Anderson *v.* Railway Co., 87 Wis. 195, 58 N. W. 79; Mason *v.* Railway Co., 89 Wis. 151, 61 N. W. 300. But they did not make the defendant responsible for the narrowness of the lane; nor require it to restore and maintain the same to its former condition of usefulness, as in the case of a public street or highway. Sanb. & B. Ann. St. 1898, §§ 1828, 1836, subd. 5. The railway was there for the purpose of running trains over it. That was obvious to every body having occasion to cross. The train in question was due about the time of the injury. The driver was a mature man, and lived near and must have known of the conditions present. If he failed to look and observe the coming train, then he was guilty of contributory negligence which would prevent a recovery. If he kept a proper lookout, and saw the coming train, and took his chances, then he was simply reckless. Assumptions as to the speed of moving trains, in cities, may be indulged when they are not in sight, but cannot be relied upon by travelers who have a plain view of the coming train, and hence bound to observe its speed. Langhoff *v.* Railway Co., 23 Wis. 43; Schneider *v.* Railway Co. (Wis.) 75 N. W. 171, 172; Chase *v.* Railroad Co., 167 Mass. 383, 45 N. E. 911. The ruling of the trial court is in strict accord with numerous and some very recent decisions of this court. Groesbeck *v.* Railway Co., 93 Wis. 505, 67 N. W. 1120; Schneider *v.* Railway Co. (Wis.) 75 N. W. 171, and cases there cited. The judgment of the circuit court is affirmed.

DARWOOD

v.

UNION TRACTION CO.

(*Supreme Court of Pennsylvania, Jan. 30, 1899.*)

Street Railway Crossing Accident—Obstructed View—Contributory Negligence.—It is such contributory negligence to drive upon an electric railway track without stopping to look for approaching cars, immediately after leaving a point from which the view of approaching cars is obstructed, as to preclude recovery for injuries resulting from a collision with a car while so attempting to cross the track, even though the car was being negligently run at a street crossing when the collision occurred.

APPEAL by plaintiff from Philadelphia county court of common pleas. *Affirmed.*

Plaintiff, Joseph E. Darwood, was delivering milk and cream on his regular route, and started his horse down Carpenter street, on the south side, going towards Nineteenth street, driving along at about four or five miles an hour. The horse was trained to stop on hearing the bell of a car. On the northwest corner of Nineteenth and Carpenter streets was a grocery store, around the front of which was an awning with a flap suspended from the top rail, and upon which were hung various articles, so that the view northward from Carpenter street along Nineteenth street was obstructed. He looked out of his wagon, after his horse was upon the track, and saw a car up Nineteenth street, by a telegraph pole, 115 feet above Carpenter street. Plaintiff urged his horse forward to clear the track, when the car struck the tire of his hind wheel.

The following testimony was elicited from plaintiff on cross-examination: "Q. Was there anything hanging there? If so, what? A. Yes, sir; chickens, hams, and beef; such things as usually hang in a store. * * * Q. And they were hanging on the Nineteenth street side, weren't they? A. Yes, sir. Q. None on the Carpenter street side? A. None

*See Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante* and *note*.

on the Carpenter street side. Q. And they were hanging along the outside edge of the awning, in a line over almost where the curbstone is on Nineteenth street? A. They were inside the curb. Q. Well, about? A. They were about where awnings are generally placed. * * * Q. Why didn't you see when you got to the house line? A. Because I couldn't see. Q. Why? A. On account of the obstruction. Q. (Photograph shown witness.) Is that a correct photograph of the corner? A. With the exception of the curtains hanging round, which were not there at that time. Q. Did you ever say a word about curtains before? A. I don't think I did. Q. Either at this trial or the other trial? * * * Q. That was at the roof? A. It hung down, I should judge, three or four feet. * * * Q. Today you have spoken for the first time of the existence of a curtain hanging on an awning; so I understand you now, in your sitting position, without your stooping, you claim that it was the awning flap that prevented your sight from seeing, and not the chickens and hams? A. It was all together. The hams and chickens were hanging round the flaps. The flaps which go round the awnings were about that depth (indicating), which everybody knows. Q. About eighteen inches? A. I couldn't tell you. Q. It wasn't the chickens and hams, but was the curtain? A. When I got to the house line—It was the curtain on the edge of the awning. * * * By the Court: Q. I want to know, when you came to a thing which prevented your seeing, why didn't you stoop down to look under it? A. When I got to the curbstone—Q. But why didn't you when you came to the house line? A. Well, I leaned out, but I didn't stoop down low enough. Q. Why didn't you? A. I didn't hear no sound of no gong and no car, and I thought I could get safe."

Wm. C. Stoever and *Henry Budd*, for appellant.
William Henry Lex and *Thomas Leaming*, for appellee.

PER CURIAM. On the trial in the court below, the defendant offered no testimony, and consequently the case was disposed of solely on plaintiff's evidence, part of which tended to prove that defendant was guilty of negligence in carelessly running its car at an unsafe rate of speed, &c. This, without more, would have necessitated a submission of the case to the jury; but it also appeared, by undisputed evidence, that the plaintiff himself was guilty of negligence which contributed to his injury. In

view of this undisputed fact, the learned trial judge rightly held that plaintiff could not recover, and accordingly directed the jury to find for the defendant. The evidence of plaintiff's contributory negligence was such that a verdict in plaintiff's favor was unwarranted, and, if found, could not have been sustained. It therefore follows that there was no error in directing the jury to find for the defendant. Judgment affirmed.

ATCHISON, T. & S. F. R. Co.

v.

HOLLAND.

(*Supreme Court of Kansas, Feb. 11, 1899.*)

Accident at Crossing—"Look and Listen".*—A person who sees a railroad track upon which trains may pass at any time is already warned of danger; and it is the imperative duty of one about to cross the tracks of a railroad to at least look and listen for approaching trains: and if he fails to look, when by looking he could see a coming train, and there is no excuse for such failure, he will be deemed guilty of negligence *per se*, and not entitled to recover for injuries sustained in a collision with a train, although those in charge of the train failed to give any signals of its approach.

Same—Contributory Negligence.—A person familiar with a railroad crossing, where she was injured, and who knew a train was due, looked for a train when she was on a road 111 feet away from the crossing, and afterwards she drove the distance named on a road parallel with the track, and upon the crossing, without looking for a train, when, if she had looked at any point within 100 feet of the crossing, or when she was about to cross, she could have seen the coming train, and averted the injury. *Held*, that she is guilty of contributory negligence.

(Syllabus by the Court.)

ERROR by defendant from Cowley county district court. *Reversed.*

*See Ritzman *v.* Philadelphia & R. R. Co. (Pa.), *ante*, and *note*.

A. A. Hurd, *W. Littlefield*, and *O. J. Wood*, for plaintiff in error.

Madden & Buckman, for defendant in error.

JOHNSTON, J. Lou Holland collided with a locomotive and passenger train of the Atchison, Topeka & Santa Fe Railroad Company at a railroad and highway crossing, and she seeks to recover for the injury sustained. The case was before the court in 58 Kan. 317, 49 Pac. 71, when a judgment in her favor was reversed because some of the findings of the jury were held to be contrary to the evidence and inconsistent with each other. The case having been remanded, another trial was had, which again resulted in a verdict against the company, and with it were returned special findings of fact. There is complaint, and not without cause, that some of the findings were made without due regard to the evidence; and, further, that they are in conflict with each other. Without stopping to investigate the merits of this complaint, we pass to the consideration of the claim that the failure of the plaintiff to look for a train when she approached and was about to pass over the crossing bars a recovery. The negligence alleged against the company was the failure of those in charge of the train to sound the whistle 80 rods from the crossing, or to give any warning of the approach of the train to the crossing. Although some of her own witnesses testified that signals were given, others stated that the train approached the crossing without signal or warning of any kind; and, under this testimony and the finding of the jury, we must assume that the negligence of the company is established.

Case Stated.

As to the care exercised by the plaintiff, the facts are not in dispute. It is conceded that she lived in the vicinity of the crossing for 12 years, and was familiar with the surroundings. The collision occurred on a bright, clear day, when she was returning to her home from Winfield. She was driving a gentle horse, attached to a top buggy, but the top of the same was down; and, when she was about to cross the track, there was nothing to obscure the view or prevent her from seeing the approaching train at any point within 525 yards of the crossing. She knew the train was due and had not passed. She had in mind the coming of the train, and knew that it would not stop at the station of Hackney, which was near the crossing. She kept a lookout for the train as she traveled from the store, across the switch, and over to a highway

which parallels the track, but did not look for the train while traveling down this parallel road for a distance of 37 yards, nor when she arrived at the crossing. On the former trial there was testimony tending to show that she kept a lookout while traveling along the parallel road, and before she entered upon the crossing; but at the last trial she expressly stated that she did not look for the train at any time after she reached the parallel road. Among other findings, the jury state that she knew when the regular train was due, was familiar with the crossing, and could have seen an approaching train just prior to the time she attempted to cross the track, if she had looked. It was also found that, if the plaintiff had looked for the train during the last 75 feet before she drove on the crossing, she could have seen it in time to have avoided the disaster, and that, if she had stopped her buggy and looked for it during the last 100 feet before she drove on the crossing, she could have seen the train. There is also a finding that she knew that the train was likely to come from the north at any time while she was driving the last 100 feet before reaching the crossing, and that she drove on without turning her face towards the back of the buggy, for the purpose of looking for the train that was following her. In this connection, the jury found that she could not obtain a view of the track without stopping her vehicle, and, in answer to a question as to whether she could see the train when she was about to cross, the jury answered, "No; not without neglecting her horse." In view of the testimony that the horse was gentle, moving along on a jog trot, at the rate of five miles an hour, with nothing to excite either horse or driver, that the top of the buggy was down, and that there was nothing to obstruct the view or prevent her from seeing the train if she had looked over her shoulder, these findings were little less than absurd, and, like the one finding that she was wantonly run down by those in charge of the train, were without support. In answer to other questions, the jury expressly found that if she had looked up the track just before going upon the crossing, or while traveling the last 37 yards of the parallel road, she would have seen the approaching train. Although finding that she did not look while traveling that distance or when she was about to cross, and that she could have avoided the collision if she had looked, the jury found that she was not negligent, and that she exercised due care and prudence in approaching the crossing as she did.

These findings, together with the undisputed facts, present the bald question whether a traveler who is expecting a train approaches the railroad crossing, having looked for a train when 37 yards away, and then travels the last 37 yards of the highway without looking along the track, does not look when she is about to cross the railroad, when by looking she could have seen the train and avoided the injury, is guilty of contributory negligence. The standard of duty of the traveler, as measured by the law in such cases, is well established, and has been frequently stated by this and other courts. In Railway Co. *v.* Adams, 33 Kan. 430, 6 Pac. 530, it was said that "it is the duty of a traveler upon a highway about to cross a railroad track to make a diligent use of his senses in order to ascertain whether there is a present danger in crossing. This is required, not alone for his own safety, but also for the protection of the lives of the passengers upon the railway trains. The traveler who fails to take this precaution is not using ordinary care." In that case it appeared that the traveler drove upon the railroad track without looking; and, although it was shown that the company was negligent in failing to sound the whistle for the crossing, it was held, as a matter of law, that the plaintiff's negligence barred a recovery. In Beach, Contrib. Neg. § 23, it is said to be "well settled that, under such circumstances [where a railroad track crosses a highway upon the same level], a traveler must look up and down the track attentively; and a failure to do so is generally negligence, as a matter of law." In Railroad Co. *v.* Townsend, 39 Kan. 115, 17 Pac. 804, the plaintiff, who was injured at a crossing, looked for the train when he was 70 feet from the track, and then ceased to look, although he had an unobstructed view, while traveling the last 60 feet before crossing; and it was held that he was not excused for failing to use his senses in discovering the approach of a train from a point where he could have seen or heard it. The court there recognizes the rule that, where the facts are such that different men might arrive at different conclusions as to the degree of care exercised, the question is for the jury, but felt bound to hold that a person who went upon a railroad track without using his senses to discover whether there was danger, when by looking he could have seen and avoided the danger, is negligent. In Roach *v.* Railroad Co., 55 Kan. 654, 41 Pac. 964, a traveler was killed on a railroad crossing. It was clear from all the evidence that he could have seen the approaching train, which collided with him, when he was 30 feet away

Accident at Crossing—"Look and Listen."

from the track. He was familiar with the crossing and the surroundings, and it was held to be negligence *per se* for him to drive upon a crossing when a regular train was about due, without looking for an approaching train, which he might have seen in time to have avoided injury to himself if he had looked, and that such negligence will bar a recovery, although the railroad company had failed to give any signals or warning of the approach of the train. In Young *v.* Railway Co., 57 Kan. 144, 45 Pac. 583, a person injured in a collision at a railroad crossing stated that she looked and listened for the train several times after she was within 100 feet of the crossing, and, although she could see along the track for 80 rods, she saw no train until she was struck by the locomotive. Notwithstanding her testimony, the court held, as a matter of law, that she was guilty of contributory negligence, on the theory either that she did not look and listen, as the law requires, or that, having looked and listened, she saw the train, or ought to have seen it, in time to have avoided the injury. It is generally held that the track itself is a warning, and the traveler in possession of his senses is bound to recognize a crossing as a place of danger, and the failure to make vigilant use of the senses in order to ascertain whether there is a present danger in crossing the track bars a recovery. On account of the great number of accidents which occur on crossings, the law requires vigilance by both railroad employees and travelers upon the highway; and, as remarked by the chief justice in Railroad Co. *v.* Willey, 57 Kan. 770, 48 Pac. 27, "regard for one's own personal safety and that of others to whom he may stand in dangerous relations requires the exercise of diligence and caution, and the policy of the law should be to impose penalties upon the negligent injurer, and likewise to withhold relief from the negligent sufferer." See, also, Clark *v.* Railway Co., 35 Kan. 350, 11 Pac. 134; Railroad Co. *v.* Davis, 37 Kan. 743, 16 Pac. 78; Railroad Co. *v.* Priest, 50 Kan. 16, 31 Pac. 674; Railway Co. *v.* Bartley (Kan. Sup.) 53 Pac. 66; Mann *v.* Stock-Yard Co., 128 Ind. 138, 26 N. E. 819; Haines *v.* Railroad Co., 41 Iowa, 227.

Same—Contributory Negligence.

The plaintiff was of mature years, in the full possession of her senses, was anticipating the coming of the train, and was well acquainted with the crossing. Her horse was tractable, and there was nothing at the crossing to obscure her view or prevent her from discovering the danger. She did look for a

train when she drove into the parallel road, but not afterwards; and, with the fact in mind that the train would soon pass, she heedlessly drove upon the parallel road, a distance of 111 feet, without looking for the train, and, worse than that, did not look when she reached the crossing and was about to pass over. These facts being conceded and found, there is no escape from the conclusion that she was culpably negligent. If there was any dispute as to whether she had looked when about to cross, or a question as to whether looking would have availed her, or if the presence of a flagman or the surroundings of the crossing had been such as to allay apprehension of danger or blunt her caution, there might have been a question for the jury as to whether there was any excuse for omitting to take the ordinary precautions for her own safety. There was nothing, however, in the existing conditions, which prevented her from seeing the danger if she had looked, nor in escaping injury if she had taken this precaution. Under our cases, the minimum of care to be exercised by her was to look and listen for the train, where the surroundings admit of this precaution; and some courts go to the extent of holding that it is also the duty of a traveler to stop, look, and listen. In this state it has been held that, ordinarily, it is not the duty of a traveler, on approaching a railroad track, to stop, but that if the view of the track is obstructed, or the conditions surrounding the crossing are such that the traveler cannot by looking and listening, determine whether it is prudent to cross the track, he must stop; and whether the circumstances require him to stop is ordinarily a matter for the determination of the jury. Railroad Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257; Railway Co. *v.* Williams, 56 Kan. 333, 43 Pac. 246. The failure of a traveler to use his senses to ascertain if there is danger before crossing a railroad, and to at least look and listen for an approaching train, is so manifestly contrary to the conduct of an ordinarily prudent person that the law regards it as negligence. The standard of duty and care in such cases being fixed by law, and the facts, about which there is no controversy, being such as to show beyond question that the plaintiff's conduct did not come up to the prescribed standard, but was a plain and palpable want of care, nothing remains for this court but to determine the matter of liability. It is clear that she neglected to exercise the care which the law required, and as we have seen, there is nothing in the circumstances which excuses her negligence,

or gives her a right to damages for injuries which would have been averted if she had taken the care dictated by common prudence. The judgment will therefore be reversed, and the cause remanded, with directions to enter judgment for the defendant below. All the justices concurring.

ATCHISON, T. & S. F. R. Co.

v.

HENRY.

(*Supreme Court of Kansas, March 11, 1899.*)

Railroad Crossing — Insufficient Width — Negligence.—Railroad companies must know the requirements of harvesting machines in general use throughout the state, as to the width of highway crossings necessary to enable persons to drive them safely over, and a failure to provide suitable crossings for such machines, whereby injuries occur, is negligence.

SMITH, J., dissenting.

(Syllabus by the Court.)

ERROR by defendant from Osage county district court. *Affirmed.*

A. A. Hurd, *O. J. Wood*, and *W. Littlefield*, for plaintiff in error.

Waters & Waters, for defendant in error.

DOSTER, C. J. This was an action for damages brought by Allie May Henry, widow of Frank B. Henry, against the Atchison, Topeka & Santa Fe Railroad Company, for negligently causing his death by its failure to maintain a highway crossing suitable for the passing of a harvesting machine over it, whereby the machine became stuck upon the track, and the engine and train collided with it. The case has been to this court before. Railroad Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576. The substantial facts are stated in the report of the former decision. The case was reversed because of misdirection of the jury. Upon the second trial the plaintiff again recovered a verdict and judgment, from which error has been prosecuted to this court. The alleged defects in the

highway crossing were insufficiency of width to accommodate the harvesting machine, and the failure to lay the planks composing it to correspond with the angle made by the railroad and the highway. The railroad company's defense to the action was that the crossing maintained by it was at a proper angle and of sufficient width to accommodate all the ordinary travel over it; that the harvesting machine was of an unusual width; and that it had no knowledge that a machine of such width and requiring such highway accommodations was in use. The jury made special findings of fact. Those material to be adverted to are as follows: "Q. 2. Did Edmund Stredder know the condition of the crossing in question at the time he attempted to cross over it with the binding machine on the day of the accident?" A. Yes. Q. 3. Could Edmund Stredder have passed over the crossing in safety, had not one of his horses shied and crowded the others, so as to cause the wheel at the end of the sickle bar to run off at the end of the plank crossing and catch on the rail of the track? A. No. Q. 4. Did Edmund Stredder, before attempting to pass over the crossing with his binder, know what the width of the crossing was, and believe it was of sufficient width to admit of the binding machine passing over it? A. He believed it was sufficient width. Q. 5. Was there a plank crossing of the railroad track at the place where Edmund Stredder attempted to cross with his binding machine on the day of the accident? A. Yes. Q. 6. If you answer the last question in the affirmative, then state how many planks there were between the rails, and how many on the outside of each rail. A. Four between and one on outside of each rail. Q. 7. If you answer that there was a plank crossing at that place, then state the length of the planks at that crossing. A. Fourteen feet. Q. 8. If you answer that there was a plank crossing at the point in question, then state the thickness and width of the planks. A. Two and one-half inches thick by eleven inches wide. Q. 9. If you answer that the space between the rails at the crossing was not all planked, then state what part or portion of it was not planked. A. None, except room for flanges on wheels. Q. 10. If you answer that there were planks at the outside of each rail of the crossing in question, then state the width and thickness of such planks. A. Two and one-half inches thick by eleven and one-half inches wide. Q. How many horses did Edmund Stredder have drawing the binder at the time he attempted to pass over the crossing in question? A.

Three. Q. 12. Of what make or manufacture was the binding machine in question? A. Deering binder, seven feet cut. Q. 13. How many wheels were there that carried the binder or on which it ran? A. Two. Q. 14. What was the distance from the outside of the main or drive wheel and the outside of the small wheel that carried the sickle? A. Ten feet and four inches. Q. 15. Could the binding machine in question have been taken over the crossing where the accident occurred, with safety, if drawn by two horses, and with the exercise of ordinary care and prudence on the part of the driver? A. No. Q. 16. If you answer 15 in the negative, then state why it could not. A. The surface on the approach was too narrow. Q. 17. Could the binder in question have been driven over the crossing in question, if drawn by three horses abreast, without getting caught or stuck upon the rail. if the outside horses had traveled outside of the planks and between the ties? A. No. Q. 18. Was there anything to prevent a horse from walking over the track outside of the planks at the crossing in question? A. Yes. Q. 19. If you answer the last question in the affirmative, then state what there was to prevent a horse crossing the track at the end and off the planking. A. The ties and rails. Q. 20. Did the outside horse called 'Old Bony' crowd the other horses so as to cause the small wheel carrying the sickle bar to run off the planking and get caught upon the rails of the track? A. Yes. Q. 21. When Edmund Stredder drove upon the crossing just before the accident, with the machine in question, did both the drive wheel and the small wheel carrying the sickle bar run upon the planking of the crossing? A. No." "Q. 46. Had Edmund Stredder, whose binder was stuck on the crossing, the day before that crossed the same kind of a crossing on defendant's track, with the same machine, without any difficulty or trouble? A. Similar crossing. Q. 47. What was there to prevent Edmund Stredder from leading the third horse so as to have his machine pulled by the team only over the crossing, outside of the extra trouble or care? A. Inconvenience. Q. 48. At the time of the accident in question could Edmund Stredder have crossed over this crossing with the machine with a team of two horses easily, and without any trouble or danger of getting off from the crossing? A. No. Q. 49. If you answer the last question in the negative, then state why he could not have driven it over the crossing with a team of two horses, in safety, at that time. A. The approach was too narrow. Q. 50. Could the binder in question

have gone over the crossing so as to have left a foot and a half from the outside of its wheels on each side of the ends of the plank on each side? A. No. Q. 51. If you answer the last question in the negative, then state how much room would have been left on the outside of each of the wheels on the plank crossing. A. One inch on each end. Q. 52. At what angle did the railroad cross the alleged public road at the time of its construction? A. Seventy degrees and twenty-eight min." "Q. 54. Did the traveled track of the road, both north and south of this crossing, make a bend so as to make the crossing at more nearly a right angle? A. No evidence to show that it did at this particular time." "Q. 77. Do you find from the evidence that Edmund Stredder had as much knowledge of the character and condition of the crossing where this accident occurred, and of the Deering binder, and of the breadth of crossing required by it, when pulled by three horses, as the defendant company had, before the time that he attempted to drive over the crossing with the machine so pulled by three horses? A. Yes. Q. 78. Did Edmund Stredder, before he got upon the crossing, believe that he could drive over it, with the machine pulled by three horses, with safety, without the machine getting caught or stuck upon the crossing? A. Yes. Q. 79. Were the opportunities of Edmund Stredder for knowing the condition of the crossing, as to being safe over which to drive a machine of this character pulled by three horses, as good or better than those of the railroad company? A. It was as good. Q. 80. Do you find from the evidence that Deering binders, like the one with which the train collided, were in general use in the vicinity of the crossing in question prior to that time? A. No." "Q. 82. Had Edmund Stredder been acquainted with the crossing where this casualty occurred ever since the railroad was constructed over that highway? A. Yes. Q. 83. Do you find from the evidence that Deering binders, of the size of the one with which the train in question collided, had ever been transported over this railroad crossing or upon this highway, pulled by three horses, prior to the date of the derailment of the train? A. No. Q. 84. Do you find from the evidence in this case that Deering binders, of the size and description of the one with which this train collided, had been transported over the crossing in question, along that highway, prior to the date of the collision and derailment of the train? A. No." "Q. 86. Does a Deering binder of the size and description of the one in question require a greater width of crossing when

drawn by three horses than when drawn by two? A. Yes. Q. 87. Do you find that railroad company had knowledge that Deering binders of the size and description of the one with which the train collided were transported over and along the highway in question prior to the date of the derailment of the train? A. No." "Q. 89. Do you find from the evidence that Edmund Stredder was the first person that ever attempted to pass over the crossing with a Deering binder drawn by three horses? A. Yes. Q. 90. Did Edmund Stredder, prior to the time his binder became stuck on the crossing in question, know or have reason to believe that Deering binders, such as the one in question, could not be safely taken over this crossing, when drawn by three horses, without being caught or stuck upon the railroad track? A. No."

There is nothing in these findings which acquits the plaintiff in error of the charge of negligent maintenance of the crossing. It is true that Deering binders, of the size and description of the one in question in this case, had never been transported over this particular crossing prior to the time of the accident; and it is also true that the evidence did not show that Deering binders like this particular one were in general use in the vicinity where the accident occurred. The jury, however, do not find that binders other than those of the Deering make, and of a size and description like those of the Deering, were not in general use in that vicinity, or had not been transported over that particular crossing. It is also true that Stredder, the driver of the binder, had as much knowledge as the railroad company of the width and other conditions of the crossing, and that he had driven the machine over a similar crossing the day before. None of these matters, however, are of avail to excuse the railroad company. The statute requires railroad companies to maintain highway crossings at least 12 feet wide. That is the minimum; but, if the necessities of public travel require them of greater width, railroad companies must take notice of the fact, and establish them accordingly. Kansas is a wheat-growing state, and binders and harvesting machines of all kinds are in common use throughout its limits. Railroad companies must know the requirements of harvesting machines at highway crossings, and they cannot be excused from the obligation to maintain crossings of a width sufficient to accommodate the machines in general use in the state, upon the ground that they did not know that one of more

than ordinary width had been introduced in a particular community, and was liable to be driven over the crossings there. While they may not be required to take immediate notice of recent and extraordinary enlargements of the size of harvesting machines, as soon as the inventions are put upon the market, and immediately improve their highway crossings to accommodate such new inventions, they nevertheless are chargeable with knowledge of the requirements of such machines as are in general use in the agricultural states through which they pass. There is, as before remarked, nothing in the findings to indicate that machines of the size of the Deering binder in question were not in general use in the vicinity where the accident occurred. In fact, there is nothing in the findings to indicate, to persons without special knowledge upon such matters, that the machine in question was one of more that usual size or width. Its width is stated, but we do not judicially know from that whether it was wider or narrower than the average. We infer, however, from the arguments of counsel, that it was wider, and have viewed the case accordingly. Passing beyond the findings of the jury to the evidence in the case, it appeared in testimony that the accident in question occurred in Ellsworth county, and that that county is in the wheat belt of the state,—a region where wheat growing is more general than in other parts, and that Deering machines of the size and kind in question were, and for 10 or 12 years had been, in common use in that part of the state. While no specific findings were made that Ellsworth county is in the wheat belt, and that the machine in question was in general use in the wheat belt, these matters, so far as essential to the plaintiff's recovery, are included in the general verdict, and operate as much in plaintiff's favor as though they had been specifically found. It matters not that Stredder had as much knowledge as the railroad company of the suitability of the crossing for the purpose of driving harvesting machines over it. The case is not determinable upon the strength of what Stredder knew or did not know, nor upon presumptions as to what the railroad company in fact knew, but upon what it, as a matter of general knowledge, was required to know.

Some exceptions were taken to the reception of evidence in behalf of the defendant in error, and some objections were made to instructions given to the jury. We have examined these claims of error. They are unfounded. The judgment of the court below is affirmed.

JOHNSTON, J., concurring.

SMITH, J. (dissenting). I cannot agree with the majority of the court. Liability of the railroad company for the death of Frank B. Henry is made to depend upon a conclusive presumption fixed upon it, of which no contradiction is permitted, to the effect that it had knowledge, or ought to have known, that Deering harvesters of unusual width were in use in the wheat belt of Kansas. This, in my judgment, is not one of the cases where the rights of a party should be dependent upon the doctrine of constructive knowledge. Such considerations rightfully enter into a case involving a claim of immunity from punishment, based upon ignorance by a violator of the law, where public policy demands that no one should plead lack of knowledge as an excuse for its infraction. Here, however, the matter is decided by interposing a positive obligation to know a thing, by which all inquiry is stifled, and complete information conclusively imputed to a party of a mere fact in the case; the real truth, as disclosed by the evidence, being otherwise. The railroad company more than satisfied the minimum obligation resting upon it when it constructed a crossing 14 feet wide. When this case was here before (45 Pac. 576), CHIEF JUSTICE MARTIN said: "The evidence does not show whether the machine in question was of unusual width or not, and if its width was exceptional, and it was an uncommon occurrence for a vehicle or machine to require so much breadth of crossing for its accommodation when drawn in the usual manner, it would be unfair to charge the railroad company with notice that a crossing of greater width was necessary."

The following is a summary of the facts found by the jury: That Deering binders, the size of this one, had never been transported over the railroad crossing or upon this highway, pulled by three horses, prior to the derailment of the train; that Stredder, the owner of the machine, had as much knowledge of the character and condition of the crossing where the accident occurred, and of the Deering binder, and of the breadth of the crossing required by it, when pulled by three horses, as the railroad company had before the time he attempted to drive over the crossing; that he (Stredder) on the day before the accident, crossed the same kind of a crossing over the railroad track, with the same machine, without any difficulty or trouble; that the evidence did not show that binders like the one with which the train collided were in general use in the vicinity of the crossing in question prior to the time of the accident; that the railroad company had no

knowledge that Deering binders, of the size and description of the one with which the train collided, were transported over and along the highway in question prior to the date of the accident; that Stredder was the first person who ever attempted to pass over the crossing in question with the Deering binder drawn by three horses. Again, the jury was asked and made answer to this question: "Q. 90. Did Edmund Stredder, prior to the time this binder became stuck on the crossing in question, know, or have reason to believe, that Deering binders, such as the one in question, could not be safely taken over this crossing, when drawn by three horses, without being caught or stuck upon the railroad track? A. No." If Stredder,who owned,used,and operated the machine,did not know, or have reason to believe,that a Deering binder like the one in question,could not be safely taken over this crossing when drawn by three horses, how could the railroad company be expected to know? If the railroad company must know of the progress made in the manufacture and use of improved farm machinery, by which the width of harvesting machines was increased, thus demanding a corresponding increase in the width of road crossings, it is charged with a greater knowledge on the subject than the farmer had whose duties required him to use and operate said machine and haul it from one place to another. While the railroad company may often transport such harvesters, and its employees may see them in the fields adjacent to the track, yet their knowledge of their width and practical working must be exceedingly limited, compared with the information gained by a farmer who daily cuts his grain with this implement during the harvest season. The railroad company and its employees were in a state of ignorance as to the width of crossing demanded by such a machine, unless such knowledge could be imputed to them from the fact that such implements were in general use in the wheat belt. No claim is made that the company had actual knowledge that a wider crossing was necessary, but it is said that it ought to have had, from the fact that the crossing in question was in what is known as the "wheat belt of Kansas." One or two traveling men testified that the machines were in general use in that section, and required a crossing of 18 or 20 feet wide to let them over a railroad track. If such knowledge is to be presumed on the part of the railroad, it must, by the same reasoning, be presumed on the part of the farmer. Yet the jury found that Stredder thought the crossing was sufficient

to take the harvester safely over, and he was possessed of actual and practical knowledge of its workings, and owned large wheat fields, of over 200 acres. The company must have had knowledge of the increased width of such machines before it would be required to widen its crossings. The jury found that Stredder had as much knowledge of the character and condition of the crossing as the railroad company had, and of the Deering binder, and of the breadth of crossing required by it when pulled by three horses. If, then, their knowledge was equal, the railroad could have had no notice or intimation that the crossing was unsafe for the passage of the machine, for Stredder had none. If the actual users of these machines were ignorant of the fact that a crossing more than 14 feet wide was demanded to permit their safe moving from one side of a railroad to another, to whom else could the railroad company go for better information on this subject, if it started upon an inquiry? Certainly the traveling salesmen were not higher authority. Besides, the jury found that Deering binders like this were not in general use in the vicinity of the crossing in question prior to the time of the accident. This finding is at variance with the testimony given by the traveling men. The established facts in this case ought not to be smothered under contrary presumptions.

GALVESTON, H. & H. R. CO.

v.

BOHAN.

(*Court of Civil Appeals of Texas, Oct. 13, 1898.*)

Actions for Personal Injuries - Pleading.—In an action for personal injuries, the facts alleged in the petition not having shown contributory negligence on the part of plaintiff it was unnecessary to allege due care on his part.

Same—Assumption of Risk.*—In such an action by a night yard master against his employer, a railroad company, the petition charged that plaintiff was injured through the negligence of defend-

*As to Assumption of Risk from Defective Track, see Illinois Cent. R. Co. *v.* Sanders (Ill.), 11 Am. & Eng. R. Cas., N. S., 861 and *note*, p. 863.

ant in hauling cars loaded with rock upon the main track; that while he was riding upon the footboard of the tank of an engine upon a switch track, the engine collided with a stone which had fallen from one of such cars; and that plaintiff was injured thereby. *Held*, that it sufficiently appeared from the petition that the rock was upon the track through defendant's negligence, and was the proximate cause of the injury; and it did not appear therefrom that plaintiff had assumed the risk.

Evidence.—Defendant was not prejudiced by the admission of evidence in its favor, even if it was incompetent.

Expert Testimony.—The opinion of an expert railroad man was admissible to show the necessity of employing track walkers for the purpose of preventing such accidents.

Same.—Such a witness was asked, if the yards were not properly inspected by the people employed for such purpose, did they perform their duty. *Held*, that an objection to such question was without merit.

Cross-examination.—Defendant's master mechanic having testified in chief that plaintiff's witness was not a truthful man, it was proper to ask him on cross-examination whether he had not given such witness a recommendation when he left defendant's employ.

Remarks of Counsel.—Where no injury is shown to have been caused by an apparently harmless remark of counsel in referring to the testimony of a witness for the other side, an objection thereto will not be considered.

Evidence.—It was not error to admit evidence to show the condition of the footboard after the accident, it appearing from the evidence that it was in the same condition on the day of the accident.

Case at Bar.—The injury having resulted from defendant's negligence in not discovering the stone upon the track, and in failing to remove it, before the accident, without fault on the part of plaintiff, and the latter not having assumed the risk, it cannot be said that the verdict was unsupported by the evidence.

Verdicts—Appeal.—In such an action, where the trial court has not seen proper to set aside a verdict as excessive, its opinion in regard thereto will not be considered on appeal.

Excesssive Damages—Appeal.—The court of civil appeals will not set aside a verdict in such an action as excessive, unless it appears that the jury were influenced by prejudice or passion, and a verdict for $14,000 does not show that the jury was so influenced, where it appeared that plaintiff, just prior to the accident, was 35 years of age, an efficient night yard master, earning $115 a month, and had, in addition to the loss of his left arm, sustained other temporary personal injuries, and, although then in good health, at the time of the trial, had suffered great pain, both mental and physical.

Galveston, H. & H. R. Co. *v.* Bohan

On Motion for Re-Hearing.

Expert Evidence.—A very wide range may be given to the admission of expert testimony.

Same.—The accident occurred on Sunday and it appeared that the section men whose duty it was to keep the track clear did not, as a usual thing, work on Sunday. *Held*, that it was not error to ask an expert as to such work, whether a track walker in the company's yard (where the accident happened) was not as necessary on Sunday as on any other day.

Case at Bar.—The evidence supported the verdict.

Instructions.—It was not error to refuse to give instructions in regard to points already properly covered by the instructions given.

Same.—It was not error to refuse to instruct on a point not in issue.

Assumption of Risk.—Plaintiff's duties, at the time of the accident, requiring him to be on the car, and he understanding that defendant had men to inspect the track on Sunday, and defendant owing him the duty of furnishing him a safe place to work, it was not error to refuse to instruct that plaintiff had assumed the risk of such accidents.

Same—Instructions.—The jury having been already instructed that "the plaintiff assumed the risks and dangers ordinarily incident to his employment," it was not misleading to charge that plaintiff assumed the "natural" risks of his employment.

Findings of Fact—Appeal.—Where the facts the court is moved to find on appeal are either uncontroverted, or are of an evidential character, the motion will be overruled.

APPEAL by defendant from Galveston county district court. *Affirmed and rehearing denied.*

Davidson, Minor & Hawkins, for appellant.
Lovejoy, Sampson & Malevinsky, for appellee.

GARRETT, C. J. This suit was brought by the appellee to recover damages for personal injuries received by him from being run over by a switch engine while in the employment of appellant as night yard master in Galveston.

Case Stated.

He was hurt on Sunday, November 8, 1896, about 7 :30 o'clock p. m., in the switch yard of the appellant, in the city of Galveston, on switch track No. 1, between Thirty-Eighth and Thirty-Ninth streets in said city. Appellee was riding on the footboard of the tank of the engine, and was going from the lower part of the switch yard of the appellant up to the roundhouse over switch track No. 1. The engine was backing. There were with appellee

on the footboard two other employees. The engine was going west at the rate of from four to six miles an hour, when the north end of the footboard came in contact with a rock on the track, which broke and jarred the board so as to throw those riding on it off to the ground. Appellee fell along the north side of the track, and the engine ran over and mangled his left arm so that it had to be amputated at the shoulder. He was injured also upon the leg. One of the men was thrown upon the center of the track and was killed; the other escaped injury. Appellee recovered judgment for $14,000. At the time he was injured he was earning $115 a month, but since then he has been unable to do anything. He was 35 years old, and was prompt and efficient in the discharge of his duties. The main track of appellant's road enters Market street at the city limits in the west, and runs east along the center of Market street to Thirty-Third street. On the south side of the main track are a number of switch tracks. Switch track No. 1 lies next to the main track, and at the point of the accident the distance between the centers of each of these tracks is 14 feet 3 inches; the distance between the nearest rails being 9 feet 2 inches. The ground between the tracks is very nearly even with the top of the ties. It is covered with cinders, and slopes a little towards track No. 1. The space between the tracks is in constant use as a way for persons on foot and on bicycles. A flat car projects 2 feet beyond the rails of a track, and is of a standard height of 4 feet. From the edge of a car standing on the main track to the end of the cross ties on track No. 1 is five feet 9 inches. Appellant had been engaged in transporting rock for use in the construction of the government jetties, and that afternoon had hauled a train load of rock, loaded on flat cars, along the main track, and switched them on to the wharf track, to be taken to the jetties at the east end of the island. Rocks that had fallen from the cars which the appellant was in the habit of transporting were frequently noticed lying about the yard, but it was the duty of the section men and track walkers to remove them, and keep the tracks clear, so that they would not be in the way, and cause accidents; but in cases of emergency the switchmen and men working in the yard would remove them. Appellee's duty as yard master was to receive orders as to the cars that were to be made into or taken from trains, and to distribute them to their proper places, and to see that they were so distributed by the switch crews; and in

performing this duty he would sometimes couple and uncouple cars. He had gone on duty on the night of the accident about 7 o'clock. He went from the office, where he had received information as to the cars to be taken out, and walked down the main track to where the switch engine was, and rode back upon it from about Thirty-Third street to where he was injured. He did not see the rock in time to avoid the accident, and was injured without fault on his part. Appellant had in use at the time four switch engines, numbered 82, 86, 87, and 94. Engine 94 had passed up, or west, on the switch track No. 1, about 6 o'clock, going to the roundhouse, and did not strike the rock. There was a conflict in the evidence about the height of the footboard on each of these engines, Nos. 94 and 87. Some of the testimony showed that the footboard on No. 94 was lower than on No. 87, from which it might be inferred that the rock was not on the track at the time No. 94 passed up, or it would have struck it. There is no evidence to show that the cars loaded with rock were negligently loaded, but from all the testimony we think that there was sufficient evidence to show that the appellant was negligent in not discovering the rock upon the track, and in not removing it. The rock was clearly the cause of the accident.

Appellant's 2d, 4th, 5th, 6th, 8th, and 11th assignments of error all relate to alleged error on the part of the court in overruling special exceptions to the petition. None of them were well taken. The allegations of the petition as to negligence of the appellant in failing to keep the track in a reasonably safe condition were sufficient, and, as the facts alleged did not develop contributory negligence on the part of appellee, it was unnecessary to allege the exercise of due care on his part. It was averred that the appellee was injured through the negligence of the appellant in hauling the cars loaded with rock, and the petition then alleged the fact of the presence of the rock upon the track, by falling from one of the cars, and the manner of the accident, from which it sufficiently appeared that the rock was on the track by the negligence of the appellant, and was the proximate cause of the accident. The petition did not aver a state of facts that disclosed an assumption of the risk by appellee, but pertinently set out the facts attending the accident which caused the injury, and the appellee's relation thereto.

Actions for Personal Injuries—Pleading.

Same—Assumption of Risk.

The 13th, 14th, 15th, 18th, 19th, 20th, 21st, and 22d assignments of error complain of the action of the court in the admission of evidence. J. H. Hill, a witness for the appellant, was asked by counsel for the appellee on cross-examination if it would not be an act of prudence and proper care to have section hands, and those employed for that purpose, to follow a train, and see that no rocks fell upon the track, or interfered with the movement of trains in any way, which was objected to by counsel for appellant, because the question called for the opinion and conclusion of the witness; but, as the answer did not prejudice the defendant, and was favorable to it, rather than otherwise, the error, if any, was immaterial, and the same may be said of the answers to the questions in the 14th and 19th assignments. The evidence of the witness C. H. Jones was admissible. It was shown that he was an expert in the matter of operation of railroads, and that it was proper that there should be a track walker for the purpose, so that the roads might be safely operated. There is nothing in the objection to the question under the 18th assignment, in which the witness was asked that, if the yards were not properly inspected by the people employed for that purpose, did they perform the duty for which they were employed? Under the 20th assignment of error appellee's counsel was permitted to ask the witness Conlon, appellant's master mechanic, on cross-examination, when Fletcher, a witness for appellee, quit the employment of the company, and if he did not give him a recommendation at the time; to which Conlon answered that he quit February 18, 1897, and that he had given him a recommendation. This was admissible for the reason that on direct examination the witness had stated that Fletcher was not a truthful man, and that he would not believe him. Counsel for the appellee, as complained of in the 17th assignment of error, in referring to the testimony of one of appellant's witnesses, used the following language: "Mr. Hill got on here, and said, a one-armed man, a one-legged man, one-eyed, half-headed man could do it." No injury was shown to have resulted from the statement of counsel, and it does not appear that witness did not say what was attributed to him. The evidence of the witness Jackson was admissible to show that there were the same reasons for having a track walker on Sunday as on any

Evidence.

Expert Testimony.

Same.

Cross-examination.

Remarks of Counsel.

other day. There is nothing in the objection to the testimony of the witness Fletcher as to the condition of the footboard of the engine No. 94, because the evidence shows that the footboard was practically in the same condition at the time that Fletcher examined it as it was on the day of the accident. Nothing prejudicial appears in the remark of counsel made as shown by the 23d assignment of error.

Evidence.

We have examined the various instructions requested by the appellant and refused by the court, as well as those given in the charge to the jury, and complained of in numerous assignments of error, and find nothing in any of them for which the judgment of the court below should be reversed. We deem it unnecessary to set them out, or to refer to them in detail, for they present no questions of law arising in the case that require discussion. Quite a number of special charges were given at the request of the appellant, which fully presented the issues in the case and the defense relied on. Some of the charges requested and refused might have been given, but the substance of them was incorporated in those already given at the request of appellant. There is nothing in the evidence to show negligence on the part of appellant in the loading or handling of the cars of rock, but from the evidence the jury were authorized to find that the appellant was negligent in failing to discover the rock upon the track, and in not removing it before the engine No. 87, on which the appellee was riding, passed along it, and after the rock train had passed. Engine No. 94 may have passed over the rock because its footboard was higher, or the jar caused by its passage may have caused the rock to shift or fall in a little different position, so that it would be struck by the footboard of engine No. 87. So we must conclude that from all the circumstances the jury might have properly drawn the conclusion that the appellant ought to have discovered and removed the rock between the time it fell from the train of rock cars and the accident. We cannot say that the verdict of the jury was without evidence to support it. There is nothing in the evidence that calls for any instruction upon the assumption of risk by the appellee.

Case at Bar.

Appellant complains that the amount of the verdict was excessive, and it also brings up a bill of exceptions, which shows that when the motion for a new trial was passed on the judge who tried the case below stated that he thought the verdict was excessive; but as the court of civil appeals, under the law,

Verdicts—Appeal.

would have the right to enter a *remittitur* for any excess that there might be, he would overrule the motion. We do not think that this remark of the judge should require this court to set aside the verdict, if otherwise it should remain undisturbed. It is sufficient to say that he did not grant a new trial, and it is our duty to pass upon the verdict of the jury without reference to what the judge who tried the case below might have thought about it, as long as he did not see proper to set it aside. The amount of the verdict is very large. It is larger than we would have assessed the damages at if the case had been submitted to us as a jury, but, in order to authorize us to set aside the verdict, we must be able to say that the jury was influenced by prejudice or passion,—either prejudice against the defendant, or sympathy for the plaintiff. There is nothing but the amount of the verdict from which we could say that there was either prejudice or passion, and the amount, taken in comparison with the amounts of other verdicts that have been approved by the supreme court and the courts of civil appeals, is not so large as to be unconscionable, or to force the conclusion that there was passion or prejudice. The loss of an arm is a very serious loss. The evidence shows, also, that the appellee at the time of his injury was earning $115 a month, was competent and efficient in the discharge of his duties, and could reasonably expect further advancement and promotion in position and salary, and that since then he had been unable to do anything. In addition to the loss of his arm, he sustained other personal injuries, and, although he is now in a healthy condition, he had suffered great pain, both mental and physical. He is not qualified for any employment at which he could make a livelihood without the use of both arms. We refer to the cases of Railroad Co. *v.* Randall, 50 Tex. 260, Railway Co. *v.* Lane, 79 Tex. 643, 15 S. W. 477, and 16 S. W. 18, and Railway Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990. The judgment of the court below will be affirmed. Affirmed.

Excessive Damages—Appeal.

On Motion for Rehearing.

The appellant strenuously insists, in an elaborate motion for a rehearing of this case, in which its views are ably presented, that this court has erred in overruling many of the numerous assignments of error presented on the hearing. We overrule the motion for a rehearing, but in doing so will briefly notice some of the questions raised.

Galveston, H. & H. R. Co. *v.* Bohan

The witness C. H. Jones testified as an expert railroad man in the care of railroad tracks. It was immaterial that he had not worked in the yard where the accident occurred within two years prior to the date thereof. He stated that he had had many years' experience as a section foreman, and properly qualified himself as an expert whose business it was to inspect tracks. A witness testifying as an expert may give his opinion upon the very issue on trial. Scalf *v.* Collins Co., 80 Tex. 514, 16 S. W. 314. The jury are authorized to disregard the testimony of an expert. They may believe or disbelieve it as that of any other witness. Railway Co. *v.* Hadnot, 67 Tex. 503, 4 S. W. 138; Kennedy *v.* Upshaw, 66 Tex. 454, 1 S. W. 308. In the opinion of Jones, a track walker was necessary in order to keep the tracks unobstructed, free or safe, so that trains could be operated over them. Other experts may have been of a different opinion, or facts may have been put in evidence tending to contradict the opinion; and from all the evidence the jury would decide the issue. Having a track walker was a matter about which the witness could state his opinion,—whether or not it was necessary, proper, or customary. In the opinion of the witness it was necessary to have one. There is a very wide range given to the admission of expert testimony. Every industry has its experts, and the operating of railroads in every branch requires expert knowledge. The engineer, fireman, brakeman, conductor, section foreman, and experienced men in other departments may testify as to what is usual, customary, or necessary to be done in their special lines of work. Railway Co. *v.* Henning (Tex. Civ. App.) 39 S. W. 302; *Id.*, 90 Tex. 656, 40 S. W. 392; Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305; Railway Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Railway Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104. The question propounded to the witness Hill, as shown by bill of exception No. 7, was: "If your yards were not properly inspected by the people you employed for that purpose that day, did they perform the duties for which they were employed?" The answer was: "I should say, no, they did not; although I want to qualify that by stating our yards are very large, and I do not think every foot of our yard is gone over every day. We do not go up one track and down the other every day, because we have twenty-six miles of track in Galveston." The question was objected to because it called for the opinion

Expert Evidence.

of the witness. If so, it was one that would be entertained by everybody. If one is employed to do a certain thing, and does not do it, it is self-evident that he does not do his duty. The question was an idle one, propounded on cross-examination, and should not have been asked, as it did not tend to prove any fact in issue; but it was harmless, and the answer of the witness went further than a response to the question in an explanation favorable to the defendant. Hill was also asked "as shown by bill of exception No. 8," the following question: "I will ask you if a higher degree of diligence with the respect to inspecting your track and roadbed over which loaded rock cars pass is not required than other kinds of freights?" It was objected to as calling for the opinion of the witness. The answer was: "There are no specific instructions given as to rock. The same degree of care is exacted in handling all kinds of freight." The answer treats the question as one of fact, and answers it as a fact that no specific instructions were given as to the handling of rock, but that the same degree of care was exacted in handling all kinds of freight. The answer was favorable to the defendant, if the question should be considered as one calling for an opinion, because it states, in effect, that no higher degree of diligence is required. So, if the question called for the fact as to the practice of the company, it was unobjectionable, and proper. If it called for the opinion of the witness, the answer was favorable, and the error, if any, was harmless. The accident occurred on Sunday. The evidence showed that the section men whose duty it was to keep the track clear did not, as a usual thing, work on Sunday.

Same.

As appears from bill of exception No. 10, counsel for plaintiff asked the witness Andrew Jackson: "Was it not as necessary on Sunday, as any other day, that the defendant should have a track walker in its yards?" Answer, "Yes, sir." The objection was that the question called for the conclusion of the witness. The witness was familiar with the work of section men, had been employed in that capacity for a number of years, and had qualified himself as an expert before answering the question. The question might have been framed so as to elicit the fact that it was customary for the defendant to operate its road on Sundays as well as on other days of the week. This would have developed the same necessity for a track walker on that day, then, as on others. It was a fact, as appeared from the evidence, that the road was being

operated on Sunday; so we can see no injury to the defendant in the error, if any there was; but the witness being familiar with the operation of railroads, we do not see any error in getting his shorthand rendition of the fact. We think there should be no hesitation in concluding that the court did not err in refusing to instruct the jury to return a verdict in favor of the defendant. As stated in the conclusions filed herein, the evidence supported the verdict in the respect that the defendant may have been negligent in failing to discover and remove the rock, and remove it in time to prevent injury to the plaintiff, and that the plaintiff was injured without fault on his part.

Case at Bar.

Special instructions Nos. 7 and 9 requested by the defendant, and refused, were fully covered in a better instruction given at its request. The instruction referred to is as follows: "The jury are instructed that to entitle the plaintiff to recover herein it must appear from the evidence that defendant knew, or could have known by the exercise of ordinary care on its part, of the alleged obstruction on or near the track of defendant, causing plaintiff's injuries; and if you believe from the evidence that an engine of defendant passed along and over said track where plaintiff was injured, safely, on the evening of November 8, 1896, and that thereafter the obstruction causing plaintiff's injuries was placed on or near said track where plaintiff was injured, but that the same was not known to the defendant, or that such alleged obstruction was of such a nature, or had existed for such a length of time, that, in the exercise of ordinary care, it could not have been discovered by the defendant before plaintiff was injured, then you will find for the defendant. The term 'ordinary care,' as used herein, is such care as an ordinarily prudent man would use under like or similar circumstances."

Instructions.

The special instructions Nos. 13 and 14, with references to the footboard being out of repair, and charging plaintiff with knowledge of its condition, were properly refused, because they would have introduced an issue into the case not made by the pleadings. The petition alleged that the injury received by the plaintiff was the result of the negligence of the defendant in two respects, *viz.* in the handling of cars improperly loaded, and in failing to discover and remove the rock which caused the accident. So it would have been error to give the instructions above referred to.

Same.

All of the remaining special instructions, to wit, Nos. 15, 16, 17, 18, and 19, requested by the defendant, were properly refused, because they are charges upon the assumption of risk by the plaintiff. The facts in the case do not warrant any such instructions. Plaintiff's duties required him, as yard master, to pass over the tracks in the yard, and to go from one place to another, frequently, upon the switch engines. The defendant owed him the duty of furnishing him a safe place to work, and seeing that the tracks were kept free from obstructions. His knowledge that rocks frequently fell from the rock trains, and, if not removed, would render the premises dangerous, did not prevent him from continuing in the service, relying on the defendant to discharge its duty in keeping the tracks clear of obstructions. The sagging of the footboard was not considered as a defect liable to cause the accident, but was a fact developed in the evidence to show that the footboard on the engine 87 was lower than on 94, which preceded it up the track. The plaintiff had the right to assume that the defendant would see that the tracks were kept free of obstructions on Sundays, whether it was customary for the section men to work on that day or not. According to his testimony, a man was supposed to be in the yards all the time, taking care of the tracks,—Sundays as well as other days; that when there was no regular track walker there was a regular section foreman, whose duty it was to go through the yards; and that it was his understanding, and he relied on it, that the defendant had men to watch the track on Sundays. The plaintiff did not rely for recovery upon the negligence of appellant in any of these respects.

Assumption of Risk.

Appellant complained of the action of the court in giving the special instruction at the request of the plaintiff. The complaint is addressed to the failure of the said charge to instruct the jury as to assumed risks by reason of appellee's knowledge of the dangerous condition of the yards, and the want of proper inspection on Sundays. As we have stated above, the case did not authorize such instruction.

The word "natural" instead of "ordinary" in the sentence "that said plaintiff, in entering such service, assumed the natural risks of the employment," etc., was not a proper word, but the charge was not misleading, the court having already instructed the jury that "the plaintiff assumed the risks and dangers ordinarily incident to his employment."

Same—Instructions.

The conclusions of fact already filed by the court are believed to be sufficiently full upon the issues presented. The facts which the appellant now requests the court to find are either facts that are uncontroverted, or those of an evidential character. The motion for additional conclusions of fact, as well as the one for rehearing, is overruled.

Findings of Fact—Appeal.

UNION STOCK-YARDS CO.

v.

GOODWIN.

(*Supreme Court of Nebraska, Dec. 8, 1898.*)

Foreign Cars—Inspection.*—A person or corporation using the cars or appliances of another person or corporation, as to its employees, uses such cars or appliances charged with the same duty as to inspection as if they were his or its own.

Same—Employees—Assumption of Risk.—An employee who, under the instructions of his master, uses the car or appliance in his master's possession belonging to some other person or corporation, thereby assumes only the same risk that he would if the car or appliance belonged to his employer.

Same—Latent Defects—Negligence.—The undisputed facts as to the condition of a defective car brake stated, and *held*, that the jury was justified in inferring therefrom that a reasonably careful inspection of the brake by a competent inspector would have revealed its defective condition, although the defect was of so latent a character as not to be discernible at a glance by one inexperienced in brake construction or inspection.

Province of Jury.—A jury has the right to draw rational, reasonable, and logical inferences from facts proved or admitted.

Evidence and Pleading.—A judgment lacks evidence to support it which rests solely on testimony irrelevant under the issues made by the pleadings.

Rules—Notice—Pleading.—That an employee knew of a "rule or custom" of his employer, by which his business was conducted, but nevertheless, continued in his service, and thereby assumed the risk

*See notes at end of case.

of injury from a defective appliance furnished him for use, is affirmative matter of defense, and must be pleaded.

Latent Defects—Assumption of Risk.*—A brakeman who goes upon a car to set a brake thereof, knowing that the car has not been inspected, does not for that reason assume the risk of the brake being defective; he not knowing that the brake is out of order, the defect not being obvious, and it not being his duty to inspect cars or brakes, or to handle cars known or supposed to be defective.

Defective Appliances—Assumption of Risk.—An employee assumes the risk arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding. Dehning *v.* Iron Works, 65 N. W. 186, 46 Neb. 556, followed.

Latent Defects—Presumptions.—No defect being obvious, an employee has the right to assume that a tool or appliance furnished him by his employer is reasonably safe and fit for the purpose for which he is required to use it.

Inspections.—To inspect a car brake may require more than a simple glance at it. Such a test must be applied as would probably reveal a defect if one existed; and the neglect of a car inspector to make such a test is evidence of negligence.

Evidence—Rulings.—Certain rulings of the trial court, on the admission of rebuttal evidence, examined, and sustained.

Contributory Negligence—Instructions.—An instruction that "contributory negligence is based upon, and presupposes, the negligence of the defendant, and cannot exist without some negligence on defendant's part", criticised, but, in view of the issues, *held* not prejudicial, if erroneous.

(Syllabus by the Court.)

ERROR by defendant to Douglas county district court. *Affirmed.*

J. R. Andrews and *F. T. Ransom*, for plaintiff in error.

Chas. Offutt and *J. P. English*, for defendant in error.

Case Stated.

RAGAN, C. The Union Stock-Yards Company is a state corporation. It owns and operates at the city of South Omaha, in connection with its business of lotting, feeding, and caring for stock in transit, a system of railroads connecting its yards with various packing houses located at that place, and which railroads connect the packing houses and yards with the terminals of the various railways centering at that point. The switching

*See notes at end of case.

and transferring of cars from the railway termini to the stock yards and packing houses is carried on by the stock-yards company with its own engines, crews, and over its own tracks. On the 10th day of April, 1895, the stock-yards company had in its employ one Edward Goodwin, who was a brakeman. On this date, Goodwin, and the crew of which he was a member, were ordered to bring from the Burlington road, or its terminus, six cars of cattle, and set the cars out at the stock-yards chute, for the purpose of unloading. One of the cars in this train was a Hammond refrigerator car, equipped with an ordinary hand brake. Fitted horizontally on the top of the brake rod or shaft, extending above the top of the car, was an iron wheel, used by brakemen for the purpose of setting the brake attached to the lower end of the brake rod by a chain. This horizontal iron wheel was fastened to the brake rod by a nut screwed on the end of the shaft. Goodwin, while in the discharge of his duties as such brakeman, in switching out these six cars of cattle, climbed on this Hammond refrigerator car; and, while the six cars were moving, he attempted (as was his duty) to set the brake. The nut which should have held the horizontal wheel firmly to the brake rod came off. The wheel came off, and Goodwin was thrown to the ground, and severely and permanently injured. The refrigerator car was not the property of the stock-yards company. The stock-yards company had not caused it to be inspected before it took it into its possession, and ordered its employees (among whom was Goodwin) to use it. The nut did not part from the brake rod because of its being worn out, nor because of any defect in any part of the brake rod or the nut itself. The end of the brake rod and the nut which slipped therefrom were both perfectly sound, but the nut was too large for the brake rod. The screw threads in the nut did not fit the screw threads on the brake rod, and the opening in the nut was so large that it could be pushed down over the threads on the end of the brake rod by one's fingers. A mere glance or casual look at the nut on the brake rod would not disclose to one inexperienced in the construction of brakes that the brake was defective in construction, and dangerous, because of the size of this nut. In the district court of Douglas county, Goodwin sued the stock-yards company for damages for his injury; alleged the improper construction of this brake; his ignorance of its defect; that the stock-yards company negligently neglected to have this car and brake inspected be-

fore taking it into its possession and causing him to use it; that a careful inspection of the brake and car by the inspectors of the stock-yards company would have revealed the defect in the brake; and that the neglect of the stock-yards company to so cause the brake and car to be inspected was the proximate cause of his injury. He had a judgment for $10,350, to review which the stock-yards company has filed here a petition in error.

1. As already stated, the car on which was the defective brake that caused Goodwin's injury was not the property of the stock-yards company. This fact, however, is no defense whatever for the stock-yards company in this case. A person or corporation using the cars or appliances of another person or corporation, as to its employees, uses such cars or appliances charged with the same duties as to inspection as if the cars or appliances were its own; and the employee who, under the instructions of his master, uses a car or appliance in his master's possession, belonging to some other person or corporation, thereby assumes only the same risk that he would if the car or appliance belonged to his employer. Gottlieb *v.* Railroad Co., 100 N. Y. 462, 3 N. E. 344; Goodrich *v.* Railroad Co. (N. Y. App.) 22 N. E. 397; Railroad Co. *v.* Mackey, 157 U. S. 73, 15 Sup. Ct. 491; Railroad Co. *v.* Penfold (Kan. Sup.) 45 Pac. 574; Railway Co. *v.* Barber, 44 Kan. 612, 24. Pac. 969; Railroad Co. *v.* Seeley, 54 Kan. 21, 37 Pac. 104.

Foreign Inspection.

Same—Employees—Assumption of Risk.

2. A contention of the stock-yards company is that, in order for Goodwin to recover, he was compelled to show by a preponderance of the evidence that a reasonably careful inspection would have disclosed the defect in the brake which caused his injury, and that he failed to make such proof. We have already stated the actual condition of this brake at the time it was used by Goodwin, in what manner the brake was defective, and the latent character of this defect to a person inexperienced in the construction of brakes who simply looked or glanced at it. The argument here is that from these undisputed facts the jury were not warranted in inferring that a careful inspection of this brake and car by the inspectors of the stock-yards company would have revealed the brake's defective condition. We do not agree to the contention. On the contrary, we are persuaded that from the undisputed facts in reference to this defective brake the jury were justified in drawing the inference that a careful in-

Same—Latent Defects—Negligence.

spection of the brake and car would have revealed the defect. It by no means follows that because a person inexperienced in the construction of a brake, seeing this one, would not have observed the defect, an inspector inspecting this car would not, by the exercise of ordinary care, have discovered the defect. An ordinary railway brakeman, simply observing a car wheel, might conclude that it was sound, while the tap of the inspector's hammer would reveal that the wheel was broken. The facts that the brake was improperly constructed, and therefore defective and dangerous, and that this defect was not apparent at a glance, stood admitted. It was a reasonable and logical deduction from these admitted facts that, had the brake been inspected by trained inspectors, the defect would have been discovered; and such logical and reasonable deduction and inference the jury had the right to draw. Kilpatrick *v.* Richardson, 40 Neb. 478, 58 N. W. 932; Supply Co. *v.* Akeyson, 45 Neb. 635, 63 N. W. 921.

Province of Jury.

In Railroad Co. *v.* Wymore, 40 Neb. 645, 58 N. W. 1120, Wymore's intestate was killed in a collision between two trains. One train was standing on a siding, and a train on the main line collided with it because the switch key in possession of the brakeman failed to open the switch lock; and it was held that the jury might properly infer from these facts that the railway company was guilty of negligence in sending out a brakeman equipped with a key which it was not known would properly control all the locks which he might have occasion to use. IRVINE, C., speaking for the court, said: "The evidence showed without contradiction that this key would not unlock this particular lock, and there was no evidence tending to show that any test had been made of it before the accident, or that any precautions had been taken to ascertain its safety." In Stock-Yards Co. *v.* Conoyer, 41 Neb. 617, 59 N. W. 950, Conoyer's intestate was last seen examining a train that had been made up ready to move. His body was found between the rails on the track occupied by the train. The second car from the rear was found derailed, caused by material on the track, and the train had moved some distance after the derailment, dragging the body of Conoyer's intestate with it. There was no other proof of negligence. The present chief justice, speaking for the court of this evidence, said: "Constitute an array of physical facts and set of circumstances which fully warranted the trial judge in submitting the case to the jury for their determination; and, finding

as the jury did, they would not be called upon, at any point in the case entering into such finding, to draw any inferences which would necessarily be violative of the rule of law which prescribes that 'inferences must be drawn from facts proved'; nor do we think that the verdict rendered necessarily involved any speculation and conjecture other than reasonable and fair inferences in view of all the facts and circumstances proved on the trial as surrounding the killing." Other instructive cases on the subject under consideration are Spicer *v.* Iron Co., 138 Mass. 426; Railway Co. *v.* Barber (Kan. Sup.) 24 Pac. 969; Railway Co. *v.* Chambers (Tex. Civ. App.) 43 S. W. 1090.

3. It is next insisted that the judgment of the district court is erroneous because the evidence shows that the stock-yards company had a "well-known rule," "custom, and manner" of doing business, namely, that all trains in which there were cars of live stock were taken to the chute, for the purpose of unloading the stock before the stock-yards company inspected the cars, and that Goodwin continued in the service of the stock-yards company with full knowledge of this rule or custom, and thereby assumed the risk of the defect which caused his injury. Assuming, without deciding, that the evidence in behalf of the stock-yards company established the existence of such well-known rule and custom, and that Goodwin, with knowledge thereof, remained in the service of the company without objection, the contention is untenable, for the reason that no such defense as this was pleaded by the stock-yards company; no such an issue was made by the pleadings in the court below, and the evidence, and all the evidence, introduced, which tended to show the existence of such rule or custom, was irrelevant. A judgment whose sole support is evidence which did not tend to prove or disprove any issue made by the pleadings in the case could not stand. McGavock *v.* City of Omaha, 40 Neb. 64, 58 N. W. 543.

Evidence and Pleading.

And this disposes of another contention of the stock-yards company,—that the court erred in refusing to submit by its instructions this defense to the jury. What the stock-yards company did plead in the court below was that before Goodwin went upon the refrigerator car, and attempted to set the brake thereon, he knew that such car had not been inspected. But this is not a plea that Goodwin assumed the risk of the defect which injured him by continuing in the service of the stock-yards company,

Rules—Notice—Pleading.

and working upon its trains, in pursuance of a "well-known rule and custom" that the cars were to be unloaded before being inspected.

4. Another contention is that Goodwin knew at the time he went upon the refrigerator car, and attempted to set the brake thereon, that the car had not been inspected, and therefore, in attempting to set the brake on that car, he assumed the risk of its being defective.

Latent Defects—Assumption of Risk.

In support of counsel's contention, numerous cases are cited, one of which is Arnold *v.* Canal Co., 125 N. Y. 15, 25. N. E. 1064. In that case, Arnold was injured while attempting to couple two cars, one of which had a broken drawhead; and the negligence charged to the company was the presence of that defect. It appeared from the evidence that the broken drawhead was obvious; and, further, it appeared that Arnold's duty was—as an employee of the company—to take out cars which were damaged, or supposed to be damaged, from trains, and place them on track for repairs. Under these circumstances, the court held that the company was not liable to Arnold for his injury. We think the holding in that case was correct, and that it is justified on two grounds: (1) The defect which caused Arnold's injury was an obvious one. That the drawhead of the car was broken was discernible from a casual glance. And (2) Arnold's business was to handle cars known or supposed to be out of repair. By engaging in this business, he assumed the risk of receiving an injury from a defective car. He was bound to know or presume that the cars which he was handling were defective, and to be on his guard. But the case is not in point here. It was no part of Goodwin's duty to handle defective cars. It was not his duty to inspect a car before using it. That was a duty which the stock-yards company owed its employees: Railroad Co. *v.* Mackey, 157 U. S. 73, 15 Sup. Ct. 491. And, though Goodwin knew this car had not been inspected, he did not know that it was out of order. The defect was not obvious, and he therefore had the right to assume that the brake on this car was reasonably safe and fit for the purposes for which it was intended.

Latent Defects—Presumptions.

Railroad Co. *v.* Penfold (Kan. Sup.) 45 Pac. 574; Railroad Co. *v.* Kellog, 54 Neb. 127, 74 N. W. 454. Among the other cases cited by counsel in support of their contention are Kelley *v.* Railway Co., 53 Wis. 74, 9 N. W. 816; Flanagan *v.* Railroad Co.,

45 Wis. 98; Naylor *v.* Railway Co., 53 Wis. 661, 11 N. W. 24; Abbot *v.* McCadden, 81 Wis. 563, 51 N. W. 1079. But not one of them, we think, sustains the contention that a brakeman who goes upon a car to set a brake, knowing that the car has not been inspected, thereby assumes the risk of the brake being defective; he not knowing that the brake was out of order, the defect not being obvious, and it not being his duty to inspect cars or brakes, or to handle cars known or supposed to be defective. On the other hand, contrary to the contention of the plaintiff in error, the doctrine of this court is that "an employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or are apparent and obvious to persons of his experience and understanding." Dehning *v.* Iron Works, 46 Neb. 556, 65 N. W. 186; Railroad Co. *v.* McGinnis, 49 Neb. 649, 68 N. W. 1057; Malm *v.* Thelin, 47 Neb. 686, 66 N. W. 650; Electric Co. *v.* Laughlin, 45 Neb. 390, 63 N. W. 941; Railway Co. *v.* Baxter, 42 Neb. 793, 60 N. W. 1044.

Defective Appliances—Assumption of Risk.

5. The next contention is that the court erred in permitting Goodwin to introduce in evidence a book known as the "Code of Rules," adopted by the Master Car Builders' Association. A number of witnesses called by the stock-yards company had testified—presumably as experts—that, in their opinion, a careful inspection of this brake by duly-qualified car inspectors would not have revealed its defective condition. Each of these witnesses on cross-examination said, in substance, that what he meant by a reasonably careful inspection was such an inspection and examination as was required by this code of rules. The code was identified by the witnesses as being the one issued by the Master Car Builders' Association, and the one in force in the month of April, 1895, in the state of Nebraska, and the one under which the inspectors of cars operated, and by which they were governed. When Goodwin came to put in his rebuttal testimony, he offered in evidence this code of rules. It is first insisted by counsel for the stock-yards company that the court erred in permitting the book to go in evidence, because counsel had not had an opportunity to cross-examine his witnesses with reference to the contents of the book. We confess we do not see the force of this objection. When the book was offered

Evidence—Rulings.

in evidence, the case had not closed, and we do not know from the record why counsel for the stock-yards company did not recall their witnesses who had identified the book, and ask them such questions as to its contents as they desired. Counsel say that their witnesses who had identified this book had left the witness stand at the time this book was offered in evidence. This, of course, is true, but it does not necessarily follow from that that they could not have recalled them. The very fact that counsel for Goodwin, while cross-examining the stock-yards company's witnesses had them identify this book, was sufficient notice to counsel for the stock-yards company that Goodwin would probably use this book in evidence on rebuttal.

A second contention is that the book itself is incompetent testimony. We do not think it was. The principal issue litigated on the trial was whether a careful inspection would have revealed the brake's defective condition; and the stock-yards company was permitted to bring experts upon the stand, and have them testify that, in their opinion, a careful inspection of this brake, according to the code of rules of the Master Car Builders' Association, would not have revealed its defective condition. Now, the book complained of is entitled "A Code of Rules Governing the Condition of and Repairs to Freight Cars," etc.; and, under the head of "Brakes in Bad Order," the very first rule is that a brake shall be considered in bad order unless the brake wheel is secured to the shaft with a properly fitted nut. This code of rules then tended to show that it was the duty of an inspector, when inspecting a brake, to ascertain if the nut was properly fitted to the brake shaft. In other words, it tended to rebut the expert testimony of the stock-yards company's witnesses that a careful inspection of the brake would not have revealed its defect. But this evidence went further. One if not more expert witnesses have been permitted to testify for the stock-yards company that a reasonably careful inspection of this brake by a car inspector consisted in the inspector looking at and observing the wheel and the nut, but that such an inspection did not require the inspector to take hold of the wheel for the purpose of ascertaining if it would come off. If an inspector is to comply with the code of rules, then he is to ascertain by inspection whether the brake wheel is secured to the brake shaft with a properly fitted nut. Within the meaning of this rule, to inspect a brake means more than to simply look at

it. An inspector may not be required to take hold of a wheel, and try to pull it off; but, to inspect it, he must know for a certainty whether the wheel is securely fastened to the brake shaft; and, for ascertaining that fact, he must use such methods or appliances as will produce an effective test whether the appliance be his hand, a monkey wrench, or some other equally efficacious instrument. We think this testimony was perfectly competent.

6. On the trial the district court, on its own motion, gave to the jury, among others, the following instruction: "Contributory negligence is based upon, and presupposes, the negligence of the defendant, and cannot exist without some negligence on defendant's part. In determining whether or not plaintiff was guilty of contributory negligence, you must take into consideration all of the facts and circumstances in the case as detailed by the evidence; and if, from all the evidence, you find that the plaintiff did not exercise usual and ordinary care, when, by the exercise of ordinary and usual care, he might have avoided the injury complained of, then, if you so find, he would be guilty of contributory negligence, and he could not recover." The criticism on this instruction is that by it the court told the jury, in effect, that the stock-yards company admitted it had been guilty of negligence. It stood admitted by the pleadings that the stock-yards company had not caused this car to be inspected before ordering its employees to use it. The neglect to inspect this car was evidence of negligence on the part of the stock-yards company. One of the defenses interposed by the stock-yards company to Goodwin's action was that his injury was the result of his own negligence or his contributory negligence. Technically, then, the instruction did not misinform the jury as to the *status* of the issues in the case. We doubt very much the propriety of ever giving such an instruction as this, but we are persuaded that the stock-yards company was not prejudiced by the giving of this instruction, if it be conceded erroneous. We find no error in the record, and the judgment of the district court is affirmed. Affirmed.

Contributory Negligence—Instructions.

Inspection.

NOTES.

Inspection of Foreign Cars.—See Louisville & N. R. Co. *v.* Veach (Ky.), 11 Am. & Eng. R. Cas., N. S., 24; Alabama G. S. R. Co. *v.*

Carroll (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759 and extensive *note*, p. 778 *et seq.*

Assumption of Risk Must Be Pleaded.—Assumption of risk is a defense to be pleaded and proven. Walker *v.* McNeill, 17 Wash. 582, 11 Am. & Eng. R. Cas., N. S., 788.

Assumption of Risk from Defective Appliances.—See generally Bussey *v.* Charleston & W. C. Ry. Co. (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive *note*, p. 484 *et seq.*

QUINN

v.

CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Iowa, Dec. 15, 1898.*)

Injury to Brakeman—Negligence and Contributory Negligence.—In an action for the death of a brakeman, alleged to have resulted from the company's negligence in allowing a switch and a car to remain in a defective condition, it was error to ignore the defense of assumption of risk, there being evidence tending to establish it, in charging that plaintiff could recover if the jury found that defendant was guilty of such negligence, and that deceased was guilty of no negligence contributing directly to his injury; and this error was not cured by another paragraph instructing in regard to assumption of risk.

Same—Same—Instructions.—In such action, it was error to give an instruction which tended to withdraw the attention of the jury from important questions by giving undue prominence to another question.

Instructions.—It was error to submit to the jury the question whether the switch was out of repair, there being no evidence tending to establish such allegation.

Same—Defective Switch—Assumption of Risk.*—Where a railroad employee is chargeable with notice of the defective condition of an appliance, and continues in his employer's service without objection or protest, and continues to use such appliance, he assumes all the risks incident to its use.

*See *note* 11 Am. & Eng. R. Cas., N. S., 485 *et seq.*

APPEAL by defendant from Scott county district court. *Reversed.*

Cook & Dodge, for appellant.
Ambrose P. McGuirk and *J. M. Beardsley*, for appellee.

Case Stated.

ROBINSON, J. The decedent, Albert L. Smith, worked for the defendant, as a brakeman, at intervals, for 10 years, and almost constantly for 5 years preceding his death. All of his service was performed on the railway which extended from Rock Island through Muscatine, and during the last year of his life his run was with freight trains over the railway between Rock Island and Eldon, which passed through Muscatine. It was the custom of the crew of his train to do work every other day on the westward run in the railway yard at Muscatine, and over and near a switch in the main line near the west end of the yard. At about 4 o'clock in the morning of November 3, 1891, before it was daylight, the decedent's train reached Muscatine from the east, and commenced to cut off cars near the switch described. Eight or nine cars were cut off, and run onto a side track eastward. The remainder of the train was then run westward on the main line until the rear end had cleared the switch, when it was stopped. Smith, who was rear brakeman, turned the switch for the main line, and the train was backed eastward; and he went westward a short distance on the south side of the track, and then went between the two cars which were to be uncoupled, while the train was moving. After a few moments, but before the cars were uncoupled, his lantern was seen to fall outside the track, the train was stopped, and he was found in an unconscious condition. His left leg had been severed from the body, and other injuries had been inflicted. He did not regain consciousness, and died within half an hour. The petition alleges that the switch was defectively constructed, and was not in good condition, and that in consequence of the defective and bad condition, and without negligence on the part of the decedent, one of his feet was caught in the switch, and held until he was run over and injured as stated. The petition also alleges that the defendant was negligent in that the engine attached to the train in question was out of repair, and not properly under the control of the engineer, and in not stopping the train within a reasonable time after the danger of the decedent was known. Negligence in other particulars is also alleged, but no evidence to show such

negligence was offered. The defendant denies negligence on its part, pleads contributory negligence on the part of the decedent, and avers that the decedent well knew the character and condition of the switch, and with that knowledge remained in the service of the defendant; that the danger he incurred by reason of the condition of the switch was a risk incident to the service which he contracted to perform, and which he accepted with full knowledge of it; and that he incurred a risk by going between moving cars to uncouple them, which was in violation of a rule of the defendant which was known to him.

Injury to Brakeman—Negligence and Contributory Negligence.

1. The fifth paragraph of the charge to the jury is as follows: "To entitle the plaintiff to recover, he must prove to your satisfaction, and by a preponderance of the evidence: (1) That the said A. L. Smith was killed by the cars of the defendant in its yards at Muscatine, Iowa; (2) that at the time of the accident the defendant was negligent, and that Smith's death was caused by such negligence; (3) that said Smith was not guilty of any negligence that contributed directly to his injury or death; (4) the damages sustained. If the plaintiff has established all of said facts, your verdict should be in his favor, but, if he has failed to establish any of said facts, your verdict should be for the defendant." The appellant complains of this paragraph on the ground that it ignored the defense pleaded,—that the decedent, with knowledge of the actual condition of the switch, remained in the employment of the defendant, and assumed the risk incident to its condition. We think this complaint is well founded. The evidence shows, without contradiction, that the decedent had worked over and about the switch in question for many years, that he had done so hundreds of times within a year preceding the accident, and that the condition of the switch and its surroundings was unchanged during that time. Therefore there was evidence to sustain the alleged assumption of risk, but that plea was ignored by the part of the charge in question. It is true that in another paragraph the court did instruct the jury in regard to the assuming by the decedent of the risk, but as the fifth paragraph instructed the jury, in plain terms, to return a verdict for the plaintiff, if the statements set out were proven, it was to that extent in conflict with the other paragraph, and of a nature to confuse the jury.

2. Complaint is also made of the sixth paragraph of the charge, on the ground that it told the jury that, from what

had been stated, "it will be seen by you that the first and principal question to be determined is that of negligence." Whether this was correct admits of a difference of opinion. The defendant contends that the question as to the assumption of risk, and waiver by the decedent of the alleged defect in the switch, in continuing in its service without objection, and with knowledge of the alleged defect in the switch, is fully as important as that of negligence. The statement may not have been prejudicial, but it tended, by giving undue prominence to one question, to withdraw the attention of the jury from other important questions. Thus, had the waiver pleaded been proven, it would have counteracted the effect of negligence on the part of the defendant in the construction and maintenance of the switch.

Same—Same—Instructions.

3. The eighth paragraph of the charge is as follows: "If you find from the evidence that the switch was not in good repair, or that it was not properly constructed; that the said Smith was injured, from the effect of which he died, and that he was so injured by having his foot caught in the switch, and that at the time he was injured he was engaged in the performance of his duty as brakeman; and that he was not guilty of any negligence that directly caused or contributed to his injury,—then on your so finding you would be warranted in finding for the plaintiff, provided that you further find that the defendant knew, or by the exercise of reasonable care would have known, that the switch was out of repair (if you find that the switch was not in repair) long enough prior to the time of the accident to have repaired the same." This paragraph is objectionable for the reason that it repeats the error of the fifth paragraph, and for the further reason that it submits to the jury the question whether the switch was out of repair. We do not find any evidence which tends to show that the switch was not in good repair. Some evidence was introduced for the purpose of showing that the plan of the switch was not the best known, but none to show that it was in bad order. This error is repeated in other paragraphs of the charge.

Instructions.

4. The fourteenth paragraph of the charge is as follows: "When an employee has knowledge, or has the means of acquiring knowledge by the exercise of ordinary care and diligence, of defects or imperfections in the switches or cars about or upon which he is employed, and continues in his employer's service without objection or protest, and continues the use of such

Same—Defective Switch—Assumption of Risk.

imperfect machinery or switches, he will be held to have assumed all the risks incident to the use of such defective machinery or switches. Hence, if you find from the evidence that the switch in use by the defendant in its yard at Muscatine was in fact defective and dangerous, and that Smith knew, or by the exercise of ordinary care and prudence would have known, that the switch was so defective and dangerous, and that it was not safe, on account of its defective and dangerous condition, to uncouple cars passing over the switch at the rate of speed you find from the evidence the cars were moving at the time Smith entered between the cars to uncouple them, or at the rate they were moving at the time they reached the switch, or to uncouple them at all while on the switch, on your so finding, Smith's attempt to uncouple the cars under such circumstances would be contributory negligence, and would defeat the right of the plaintiff to recover in this action; and your verdict should be for the defendant." That portion of the charge is substantially correct, as applied to the facts in this case. The switch in question was what is known as a "split switch," and the alleged defects therein consisted in not having a proper space between the main-track rail and the point of the switch rail, and in not having blocking in that space. It is insisted that the decedent's foot was caught in that space, and that it should have been so wide, or so narrow, or so protected by blocking, that the foot could not have been caught. If this be conceded to be true, it is apparent that Smith should have known of the defect in the switch. He had worked about it so long and so frequently that by giving reasonable attention to it he would have known the danger of being caught by it. It is not a sufficient answer to say that he had a right to rely upon proper care on the part of the defendant to make the switch safe, and that it is not shown that he knew it was unsafe. It was his duty to pay reasonable attention to the track where he was required to walk in the discharge of his duties. The drawbar of the switch, the bridles which hold the switch rails together, and the switch rails which cross the main track, necessarily make the track at a switch more dangerous than at other places; and it was the duty of Smith to know that fact, and to use reasonable care to avoid the danger. Had he done so, he could not have worked about this switch so long as he did without knowing its condition. The alleged defect was so open and apparent that Smith must be

charged with having knowledge of it. Mayes *v.* Railway Co., 63 Iowa, 562, 568, 14 N. W. 340, and 19 N. W. 680; McKee *v.* Railway Co., 83 Iowa, 616, 50 N. W. 209; Muldowney *v.* Railway Co., 39 Iowa, 615; Way *v.* Railway Co., 40 Iowa, 341; Perigo *v.* Railway Co., 52 Iowa, 276, 3 N. W. 43; Austin *v.* Railroad Co., (Mass.) 41 N. E. 288; Lovejoy *v.* Railroad Corp., 125 Mass. 79; Sheets *v.* Railway Co. (Ind. Sup.) 39 N. E. 154; Railroad Co. *v.* Baxter (Neb.) 60 N. W. 1044. In the cases of Kroener *v.* Railway Co., 88 Iowa, 16, 55 N. W. 28, and Curtis *v.* Railway Co., (Wis.) 70 N. W. 665, the evidence did not show that the employees injured by reason of insufficient blocking were chargeable with knowledge of the defect. We conclude that the verdict was contrary to the fourteenth paragraph of the charge.

5. The appellant contends that the evidence shows that the decedent was guilty of contributory negligence. In view of the conclusion reached, we do not find it necessary to determine that question, nor the effect which should have been given to the defendant's rule 31, nor whether the evidence justified the finding that the decedent's foot was caught in the switch. For the errors pointed out, the judgment of the district court is reversed.

QUIMBY

v.

BOSTON & M. R. R.

(*Supreme Court of New Hampshire, July 29, 1898.*)

Injury to Employee—Negligence—Failure to Examine Repairs—Assumption of Risk.*—In an action by an employee for personal injuries caused by the fall of a plank used as a part of a runway, while he was at work at his lathe, it appeared that he had informed defendant's foreman that an unsecured plank had fallen from the same position; that he knew that the plank by which the injuries were inflicted had been substituted for the one which first fell; that he had had no occasion, in the discharge of duties, to test the second

*See *notes*, 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*

plank; that he had not examined it to see that it was properly secured; and that he knew that certain other planks in the shop, used for the same purpose, were fastened. *Held*, that it was error to direct a verdict for defendant.

EXCEPTIONS by plaintiff from Merrimack county. *Exception sustained.*

Sargent, Hollis, & Niles, for plaintiff.
Frank S. Streeter and *John M. Mitchell*, for defendant.

BLODGETT, J. Briefly summarized, the material facts are these: The plaintiff is a machinist, and at the time of his injury was, and for many years had been, in the employ of the defendant in its shop in Concord, operating a lathe, the power for which, as for other machinery on the floor, "was obtained from a countershaft running longitudinally through the shop, and supported by timbers running in the same direction, at a height of ten or twelve feet above the floor. This countershaft was operated by belts from the main shaft, which was situated a few feet west of the countershaft, and parallel with it. A little lower than, and west of, the main shafting, and along its entire length, was a runway,—a walk over which employees passed to put on belts, oil the machinery, and do other work about the main shafting. This runway was composed of plank suspended from the floor above by rods bolted through the floor timbers. The runway was eight to ten inches higher than the countershaft timbers, and distant from them about twelve or fourteen feet. The motion and jar of the machinery caused the runway to vibrate from east to west, the vibration being greatest at the southerly end of the shop, and gradually diminishing towards the northerly end, where the runway was made fast to the wall of the building. At a point opposite the plaintiff's lathe, which was located near the southerly end of the shop, the vibration was from three-sixteenths to one-quarter inch. Upon the main shaft, near the plaintiff's lathe, was a large pulley, known as the 'wheel-press' pulley, upon which was a belt which furnished power to a machine upon the floor of the shop. Owing to the method of operating this machine, it was necessary that the workmen engaged in its operation should at all times have access to the pulley for the purpose of adjusting the belt. This was effected by extending a plank across from the runway to the countershaft timbers." Some three months before the plaintiff's injury the plank fell while

he was at work at his lathe, and barely missed striking him. He immediately called the attention of the defendant's foreman, who had general charge and supervision of the shop and the machinery, to the fact that the plank had fallen, and told him that, "if it hit anybody, it would probably hurt them very badly". Some time later this plank was replaced by another unsecured one, in substantially the same position, which subsequently fell upon the plaintiff while he was in the discharge of his duties, causing the injuries complained of. He first noticed the second plank some three weeks prior to his injury, and testified that he supposed it was fastened. He had no occasion to go upon it, and from his place of work could not see whether it was or was not fastened. He knew that a plank southerly of it, extending easterly from the runway, and used as a walkway for workmen engaged in oiling and caring for the overhead machinery, was fastened, and also another one, abont 100 feet north, and extending to the countershaft timbers. There was some evidence tending to show that, within the plaintiff's knowledge, planks used by workmen for stagings in making overhead repairs had been temporarily left stretching across from the runway to the countershaft, unsecured and unfastened; but there was no evidence that those required for permanent use at a particular place were so left, aside from the two that fell, as before stated. Upon these facts, we think that the order directing a verdict for the defendant was erroneous. The circumstances attending the injury not only tended, in our opinion, to show negligence on the part of the defendant to such an extent as to throw upon it the burden of rebutting it, but they were also of such a character that it could not properly be held as matter of law that the injury resulted from a "seen danger," or from one within the scope which both of the parties contemplated as incident to the service, or that the plaintiff, from his knowledge of the situation, reasonably ought to have anticipated. Exception sustained. New trial granted.

PARSONS, J., did not sit. The others concurred.

CAMERON

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of North Dakota, Nov. 11, 1898.*)

Motion to Dismiss—Question for Jury.—A motion to dismiss, made at the close of plaintiff's evidence, is tantamount to a demurrer to the evidence, and in such cases everything which the jury might reasonably infer from the evidence is to be considered as admitted. In the light of this established rule of practice, *held*, under the evidence, that it was error to withdraw this case from the consideration of the jury.

Master and Servant—Defective Appliances.—Employers are bound to furnish reasonably safe and adequate machinery and appliances for the use of their employees; and if the employer negligently fails in the performance of this duty, and the employee is injured thereby while in the exercise of due care, the master will be liable; and when such machinery, etc., is safe and adequate when furnished, the employer is bound to exercise due care in keeping it safe, and to this end seasonable inspection and repairs thereof are required of the employer. Under the evidence in this case, *held*, that whether these duties have been performed by the defendant, with respect to the decedent, was a question of fact for the jury.

Question for Jury.—*Held*, further, that the question of whether the decedent, as an employee of defendant, assumed the risk involved in taking charge of the train in question, in the condition it was then in, was a question of fact for the jury, under the evidence.

Same.—*Held*, further, under the evidence, that it was a question for the jury to determine whether the defendant was guilty of the negligence charged in the complaint, and also whether such negligence, if shown to exist, was the proximate cause of the injury complained of.

Same.—*Held*, further, in view of the evidence, that the question of whether any negligence of the deceased contributed to his death was a question of fact for the jury.

Actions for Death—Contributory Negligence—Presumptions.*—*Held*, in deference to the instinct of self-preservation, that, in a

*See *note* 10 Am. & Eng. R. Cas., N. S., p. 583 *et seq.*

case where there is no eyewitness of an accident resulting in death, a person who has suffered death by a railroad accident will be presumed to have been in the exercise of due care at the time, until the contrary is made to appear by evidence.

Appealable Orders.—At the close of plaintiff's evidence, the trial court, on motion of defendant's counsel, made an order dismissing the action for failure of proof. Plaintiff served notice of appeal from said order. *Held*, on motion to dismiss the appeal, made in this court, that said order was neither a judgment nor an appealable order, and, hence, that the attempted appeal from such order was abortive.

Same.—Such order was entered, without any change of its form or terms, in the judgment book of the clerk of the district court. The order concluded as follows: "The plaintiff's action is hereby dismissed. Done in open court this 8th day of December, 1897." *Held*, in view of the explicit language of the order dismissing the action, that while the same, considered as a judgment, is irregular and highly improper in form, it nevertheless embodies the final judicial determination of the action made by the trial court, and, being duly entered in the judgment book, is sufficient, in substance, as a judgment.

(Syllabus by the Court.)

APPEAL by plaintiff from Grand Forks county district court. *Reversed*.

Bosard & Bosard, for appellant.
W. E. Dodge and *Burke Corbet*, for respondent.

WALLIN, J. This action is brought by the widow of Edward James Cameron to recover damages for the alleged negligence of the defendant in causing the death of the said Cameron. The action was tried to a jury, and at the close of the plaintiff's evidence the case was withdrawn from the consideration of the jury, and the action dismissed. This ruling is assigned as error in this court, and the only question that need be determined here is whether such ruling was error.

Case Stated.

There is little dispute in the evidence as to the existence of the determining facts of the case. The record shows that the decedent was at the time of his death a passenger train conductor in defendant's employ; that on the 17th day of November, 1894, he was killed by falling or being thrown from the passenger train of the defendant then in his charge as conductor; that such accident occurred in the county of

Grand Forks, N. D., about midway between the station of Arvilla and the next station, situated about seven miles east of Arvilla, and named "Emerado." The train was east bound, and was the regular Pacific passenger train, consisting of nine cars, and running between Seattle, Wash., and St. Paul, Minn. The accident occurred between 6:43 and 6:52 p. m., and at a time when the train was running at a high rate of speed. The train reached Grand Forks at 7:25 p. m., and there the conductor was missed; and on being searched for, his body was found at the place above indicated. The evidence shows that the right shoulder of deceased was crushed down, and one of his arms broken. His skull was also broken. A physician also testified that death resulted immediately, or almost immediately, as a consequence of said injuries. The deceased had taken charge of the train at Minot, N. D. It appears that the deceased was seen alive just after the train passed Arvilla; and there is evidence tending to show that a very few minutes before the accident the deceased was seen in the rear sleeper, the last car of the train, passing through the car, towards the rear end of the car, but no witness testifies to having seen him pass out of the back door of the car and onto the rear platform at that time, or at all that day. It appears that the train in question, while backing into the station at Great Falls, Mont., met with an accident whereby the steps leading to the platform were broken, which steps were located at the rear end, and on the left and north side, of the last car in the train, which car was a sleeper, and was the same car on which the deceased, so far as shown by the evidence, was last seen alive. The rear platform of this sleeper was about five feet wide across the car, and about three feet the other way. Counsel, in discussing the case in this court, have assumed that the rear end of a platform on the last car of a passenger train is supposed to be guarded by a chain, which is so made that it can be fastened and unfastened; but the evidence in this case fails to show whether there was or was not such a chain on this car. After the steps had been broken, and before the train left Great Falls, Mont., the broken steps were removed by the employees of the defendant, and the bolts which fastened the steps were laid on the rear platform of the sleeper; and the car came east in the train, and continued to be the rear car, and said steps were absent and not on the car at any time until after it reached Grand Forks, N. D. The evidence fails to disclose whether the defendant has a car shop

or other facilities for the repair of its cars at any point on its line between Great Falls, Mont., and Grand Forks, N. D.; but the evidence tends to show that similar accidents to car steps had occurred with some frequency in the mountains between Seattle, Wash., and Helena, Mont., during the years 1893 and 1894, and that, when steps were so broken and removed at any point between the Pacific Coast and St. Paul, it was not the custom of defendant to take out the car for repairs while in transit. It is claimed that the deceased, having been in defendant's employ for some years prior to the accident, is chargeable with knowledge of this custom of the defendant in this particular, and voluntarily assumed any risk which such custom involved. Reverting to the rear platform in question, it appears that there was an iron gate, some 3½ feet high, which, when closed, shut in the platform on the sides, and prevented ingress or egress to the sleeper by way of the steps leading to the platform. These gates swing from the car to the railing,—swing out to close, and in to open. The hinge makes the fastening for the gate. There is one hinge on the gate, and one on the car, and also another hinge halfway between. As the gate closes, the hinge straightens out, and as it is opened the hinge closes at an angle; and it is not possible, without raising the hinge, to open the gate. But it appears that these gates may, when fastened, be opened by applying the hands to the gate, and are ordinarily so opened and shut. The gates, when closed, are inside the steps, so that a person on the platform could not pass down the steps without first opening a gate. A passenger from Helena, who occupied the rear sleeper, testified that he was on the rear platform between 3 and 4 o'clock in the afternoon of the day of the accident, and while there noticed the absence of the car steps, and also that the gates were at that time closed. This passenger found the back door of the car unlocked when he passed out upon the rear platform. This witness was on this car, and heard the noise caused by breaking the steps, and learned while at Great Falls that the steps were broken. It is not claimed that the gate on the north side of the rear platform was, after the steps were removed, securely fastened, so as to wholly prevent its being used or opened while in transit to St. Paul. The theory of the complaint is that after the steps were removed the car was defective, inadequate, and unsafe as a car, to the knowledge of the defendant, and might have been made safe by the defendant by the use of ordinary care, *viz.* by

securely fastening the north gate on said rear platform, which gate, the complaint alleges, "could have easily and conveniently been rendered safe, which fact was well known to the defendant, but the defendant neglected to cause said gate to be closed and fastened." The complaint avers that the deceased was unaware of the unsafe and defective condition of the car, and that while he was in the discharge of his duties as conductor of said train, and by reason of the alleged unsafe and defective condition of said car, and without negligence or fault on his part, he was cast upon the ground, and there killed. The body of the decedent was found on the north side of the track of the railroad, and in the ditch. Several articles belonging to him, including his lantern, ticket punch, certain change and pocket pieces, were also found near the body. These articles were scattered along the ground, west of the body, for a distance of 10 or 15 feet therefrom, and all of the same were found on the north side of the railroad track. The ticket punch was found some 4 or 5 feet north of the track. There was no eyewitness of the accident, and no witness attempts to testify directly as to how the deceased fell or was thrown from the train.

In this state of the evidence, counsel for the appellant insists that it was error to take the case from the jury. In disposing of this assignment of error, it is well settled that conflicts in the evidence upon material points must be disregarded, and the whole evidence is to be construed most favorably to the party against whom the ruling is made. The defendant's motion to dismiss was, in effect, a demurrer to the plaintiff's evidence, and upon such demurrer the supreme court of the United States declares the rule as follows: "On a demurrer to evidence the court is substituted in place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted." Bank *v.* Smith, 11 Wheat. 171. This court has had frequent occasion to apply this well-settled rule of practice, and has often emphasized the importance of exercising great caution in taking a case from the jury. See McRea *v.* Bank, 6 N. D. 353, 70 N. W. 813; Vickery *v.* Burton, 6 N. D. 253, 69 N. W. 193. The test is whether there is any competent evidence in the case reasonably tending to sustain the cause of action alleged; and, if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the

Motion to Dismiss—Question for Jury.

case, it is error to withdraw the evidence from the consideration of the jury. This case must be governed by this rule.

It is well settled that the master must furnish the servant with reasonably safe and suitable machinery and appliances, and if the master fails in this duty, and the servant is injured thereby while in the exercise of due care, the master will be liable for such injury. The master is bound to observe all the care which prudence and the exigency of the situation require, with respect to furnishing instrumentalities adequately safe for the use of the servant, and, when such instrumentalities are furnished, the master is required, further, to exercise due care in keeping the same safe and serviceable; and, with this end in view, the master is bound to make seasonable inspection of the condition of the instrumentalities furnished for the use of the servant. These rules are familiar, and are so frequently reiterated by the courts that authority in their support is unnecessary; but see 2 Thomp. Neg. p. 972; Wood, Mast. & S. § 329; Brann *v.* Railroad Co., 53 Iowa, 595, 6 N. W. 5; Railroad Co. *v.* Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Railroad Co. *v.* Jackson, 55 Ill. 492; Hough *v.* Railroad Co., 100 U. S. 213; Buzzell *v.* Manufacturing Co., 77 Am. Dec. 212, and notes at end of the case. These authorities show also that the deceased was not a fellow servant with other servants in the defendant's employ, whose duty it was to provide and inspect the cars furnished for the use of conductors, in the sense that the defendant would not be liable for the neglect of such other servants in furnishing adequate cars and appliances to the deceased for use in the defendant's railroad operations.

Master and Servant—Defective Appliances.

In the light of these authorities, the inquiry is presented whether the rear sleeper in question, with the steps thereof removed as before explained, was, when delivered to the deceased, in Minot, in a safe condition, and especially was it safe and adequate instrumentality, with reference to its use by the defendant as a train conductor. In view of the fact that the evidence fails to show that the defendant had facilities for repairing its cars broken in transit elsewhere than at the termini of its line, St. Paul and Seattle, we should be inclined to hold that it was not negligence on defendant's part to send the sleeper in question to St. Paul, as a part of the train to which it was attached when broken. But the ulterior inquiry is whether, after the defective condition of the

car became known to the defendant, and the defendant's employees had detached the steps as they did at Great Falls, Mont., it was an act of negligence to deliver the car to the deceased in its broken condition, without first securing the gate on the north side of the rear platform in such a manner as to wholly prevent the egress of persons within the sleeper through said gate. This could have been easily and quickly accomplished by the defendant's employees who removed the steps. It was not done, and we are of the opinion that it was a question of fact whether the omission constituted an act of negligence on defendant's part.

But counsel for the respondent further contends—and this most strenuously—that, if defendant's negligence be conceded, the evidence in the case fails to show that the death of the decedent resulted from such negligence. In other words, counsel claims that the negligence complained of does not appear to have been the proximate cause of the injury alleged, in this: that the evidence, as counsel claims, does not show that the deceased was killed by falling through the opening made by removing the steps leading to the platform in question. Upon this point we quote from the brief of the respondent's counsel: "No reason is assigned or shown by the evidence for his visiting that platform, and, having once reached it, he may have been engaged in reaching under the end of the platform to adjust the air valves. He may have fallen or been thrown off the rear end of the platform, either over or under the chain guard, or, in the absence of a chain guard, may have been cast from the platform by tramps engaged in stealing a ride, or may have deliberately reached over, unfastened the gate, opened it, and stepped out upon the tracks. The evidence does not disclose to which of these causes his death was attributable, and the rule is well settled that, if it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery. The question must not be left to mere conjecture." In support of the rule of law contended for, counsel cites, among others, the case of Koslowski *v.* Thayer, 66 Minn. 150, 68 N. W. 973; also, Moore *v.* Railway Co., 67 Minn. 394, 69 N. W. 1103, and other authority. The cases cited are not similar, as to their facts, to the case at bar, but the rule of law as announced in both of the cases is elementary; and in the case of Koslowski *v.* Thayer the court said in the syllabus "that there was no evidence furnishing a reasona-

Question for Jury.

ble basis for the conclusion that the negligence of the defendants was the proximate cause of the death of plaintiff's intestate." And in Moore *v.* Railway Co. the court gave the same reason for reversing the judgment entered in favor of the plaintiff. Both cases support the rule that a verdict must not rest on mere conjecture, and that, where the evidence is such that "it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery." Applying this rule, the question arises whether there is evidence in this case, either direct or circumstantial, upon which the jury could have reasonably inferred that the deceased lost his life in the manner alleged in the complaint; and the crucial test is whether intelligent and honest men, after carefully weighing the evidence, might fairly differ upon this question. We are of the opinion that the evidence and conceded facts in this record furnish a legitimate basis for the inference that the deceased was killed in the manner charged in the complaint, and that this inference has a stronger support in the evidence than either the conjectural theories of the accident which have occurred to us, or those which have been suggested by the learned and ingenious counsel for the respondent, and hereinbefore mentioned; and we feel very confident that, after considering the testimony, intelligent and honest jurors may have fairly differed upon the question whether the deceased did or did not lose his life in the manner alleged. It may be conceded—and that without violating physical laws, or running counter to direct evidence—that there is a naked possibility that the deceased lost his life either by falling or being thrown off the end of the rear platform, or by falling or being thrown from the steps leading out of the car from the south side of the platform; but, as we have already said, these conjectural modes of death have, in our opinion, less support in the evidence than the manner of death alleged in the complaint. The skull of the deceased was found to be broken, and the expert testimony tends to show that he died from the effects of the accident immediately, or nearly so. This being the evidence, it would, we think, be incredible to suppose that the deceased, after falling from the train on the south side thereof, should have passed to the north side of the track, where the body was found, and carried with him his several belongings which were found near the body, and also on the north side of the track. And it is only a little less incredible, in our opinion,

Same.

under the evidence, to suppose that, after being hurled to sudden death from the end of the platform, the deceased, taking all of said belongings with him, made his way to the north side of the track, and that not a single article belonging to the decedent was left behind upon either the center or south side of the track. In our judgment, neither of these hypotheses finds much support in the evidence; and, on the other hand, the evidence, in our judgment, tends more particularly to support the theory of the accident pleaded by the plaintiff.

But counsel again contends that the conceded facts in the case tend to show that the negligence of the deceased, if he lost his life as alleged, contributed to the accident, and was itself the proximate cause thereof. If this contention can be sustained upon the record, the plaintiff cannot recover. But it should not be overlooked that negligence is a question of pure fact, and never becomes a question of law for the courts, unless the facts, and all legitimate inferences therefrom, are conclusively established. In this case, the court having reached the conclusion that the evidence raises at least a probability that the deceased was killed in the manner alleged, we are next to inquire whether, at the time the deceased passed through the north gate, and onto the ground, to his death, he knew, or should have known, that the steps were removed. Under the evidence, we think the inference is legitimate that the decedent did not in fact know that the steps were removed and not in place when he passed out through that opening. The train was moving rapidly, and was then midway between stations. Under these circumstances, to have opened the door, even to look out ahead, would have been an act of great imprudence, if the decedent knew of the defective condition in question. We could not indulge such a supposition, unless the evidence and all the circumstances clearly indicated the existence of such facts as tend to show that the deceased did know of the defective condition of the car. But there is a presumption of law which furnishes a rule applicable to a case like this. The law, out of regard to the instinct of self-preservation, will presume, *prima facie*, that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care; and this presumption is not overthrown by the mere fact of the injury. Flynn *v.* Railroad Co., 78 Mo. 195. See, also, Adams *v.* Iron Cliffs Co. (Mich.) 44 N. W. 270. In the absence, therefore, of an eyewitness to the accident, it

Same.

Actions for Death—Contributory Negligence—Presumptions.

is the duty of the court to assume, unless it is shown to the contrary, that at the time of the accident the party injured was in the exercise of due care. Plaintiff being entitled, under the authorities, to invoke in her aid the legal presumption of due care on the part of the deceased, the defendant, therefore, has the burden to overthrow such presumption by evidence sufficient to do so. This burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt. If, under the evidence, reasonable men may honestly differ, the ultimate question is one of fact for the jury. As we have shown, the evidence as to the manner of the accident tends to show that the decedent did not in fact know of the absence of the car steps. The question, therefore, on this branch, is, was he bound to know the defective condition? Upon this feature we are confident that the question was one of fact, which should have been submitted to the jury, with instructions as to the *prima facie* presumption already referred to as applicable to cases of this kind. We are unable to see that this presumption has been overthrown by the evidence, or by the fact that the decedent was in charge of the train, as conductor. It does not appear from the evidence that the conductor actually visited this platform at any time during the day in question prior to the time he was killed; nor does it clearly appear that a train conductor would necessarily visit that particular platform in the discharge of his duties. We are clear that a court ought not to assume, as a mere question of law—First, that a conductor of such a train must necessarily go upon such platform in the discharge of his duties; and, secondly, being there, must necessarily have observed the absence of the car steps. The steps were not removed while the deceased had charge of the train. The car in question had been delivered to the care of the deceased as a part of a regular through passenger train. It would seem that the decedent would be justified in assuming, under the circumstances, until it appears that he actually discovered the defect in question, that the entire train was safe and adequate as a through train for the conveyance of passengers. A sleeping-car porter, who was on duty on the train throughout the entire trip, testified: "I do not know when the steps were removed from the rear end of the sleeper. Know nothing about it particularly. I knew they were off when we landed at Havre. Made no examination of the platform at the time." It is well known that the duty of a sleeping-car porter is to assist passengers on and

off sleeping-cars, and yet this porter seemed to have bee unaware of the absence of the steps until long after thei removal; and, when their absence was discovered, he appar ently paid little attention to the fact. This indifference of th porter may perhaps be explained further by another fact The porter testified: "My instructions are to lock our rea doors, approaching all important stations. This is practice at Grand Forks and Larimore. And we unlock the door upon getting away from stations. The practice is to lock th rear door of the rear car, and the forward door of the forwar car. One man has to go to the office to get his documents and that is so one man can watch two cars, leavin the two doors open together." This evidence, we think suggests a pertinent question of fact, *i. e.* whether th train conductor was aware of the custom of locking th rear door of a rear sleeper on approaching importan stations, and, if so,whether it was an act of negligenc on his part, under the circumstances, not to inspect sai platform, and discover the defects in question. At least, w are clear that intelligent men might reasonably differ upon thi feature of the alleged negligence of the decedent. The rule of law governing the question of contributory negligenc have long since emerged from the realm of doubt. Primarily the question is one of pure fact, and where the evidence i either conflicting or fairly susceptible of different interpreta tions, or the inference from the evidence doubtful, th question is for the jury. The rule is the same where th evidence is undisputed, if different inferences therefrom may be fairly deduced by intelligent minds. We cite only a few cases from the mass of authority sustaining these proposi tions: Railroad Co. *v.* Tobriner, 147 U. S. 571, 13 Sup. Ct 557; Dunlap *v.* Railroad Co., 130 U. S. 653, 9 Sup. Ct. 647 Nugent *v.* Railroad Co., 80 Me. 62, 12 Atl. 797; Payne *v* Railroad Co., 83 N. Y. 572; Adams *v.* Iron Cliffs Co. (Mich. 44 N. W. 270; Galvin *v.* Mayor, etc., (N. Y. App.) 49 N. E 675.

A single question—one of practice—remains to be consid ered. The record shows that at the close of the plaintiff's evidence, and upon motion of the defendant's counsel, th trial court made an order dismissing the action

Appealable Orders.

This order, after reciting the grounds upo which it is made, proceeds as follows: "Which motion, after being duly considered by the court, is allowed and the plaintiff's action is hereby dismissed. Done in ope

court this 8th day of December, 1897." This record shows that the clerk of the district court entered this order in the judgment book, and it appears that the order was filed with said clerk on August 5, 1898. The notice of appeal, served August 8, 1898, is in the following language: "Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this state from the judgment of dismissal made in said action on the 8th day of December, 1897, and entered in the office of the clerk of the district court on the 5th day of August, 1898, in favor of the defendant and against the plaintiff, and from the whole thereof." This order of dismissal, when made, was merely an interlocutory order, and its character as such is not affected by being misdescribed as a judgment in the notice of appeal. Under the statute governing appeals in this state, as repeatedly construed by this court, such orders are nonappealable orders. See *In re* Weber, 4 N. D. 119, 59 N. W. 523; Field *v.* Elevator Co., 5 N. D. 400, 67 N. W. 147. See, to the same effect, Locke *v.* Hubbard (S. D.) 69 N. W. 588. But the notice of appeal also states that the plaintiff appeals from a judgment of dismissal in this action which was entered by the clerk of the district court on the 5th day of August, 1898. An inspection of said judgment (a copy thereof being in the record) discloses that the same is a copy of the court's order of dismissal, and nothing different or additional thereto is contained in the same. The question is therefore presented whether this constitutes a judgment, within the meaning of the law. We are constrained to hold that it does. It embraces the disposition made of the case by the court below, and that disposition is incorporated in the judgment book. The language of the judgment is, "The plaintiff's action is hereby dismissed." This is explicit, and it is found written in the judgment book kept in the office of the clerk of the district court. It is needless to say that this mode of entering judgment upon an order of dismissal is very slipshod, and not to be encouraged. Nor must we be understood as holding that an order simply directing that the action be dismissed would, if entered in the judgment book, operate as a judgment of dismissal. Upon this question no opinion is expressed. For reasons already advanced the judgment is reversed, and a new trial is ordered. All the judges concurring.

Same.

MIDDLE GEORGIA & A. RY. CO.

v.

BARNETT.

(*Supreme Court of Georgia, May 26, 1898.*)

Impeachment of Witness.—A false statement in the testimony of a witness cannot be converted into truth by any amount of corroboration as to other matters; for a "fact disproved" is not a fact. An attempt to impeach a witness "by disproving the facts testified to by him" may, or may not, be successful. (a) The charge complained of in the present case was not substantially at variance with the foregoing.

Death of Employee—Dangerous Premises—Assumption of Risk.*—The rule of law that an employee takes the risks usually incident to the work in which he is employed does not exempt the master from liability for the death of a servant resulting from the negligent failure of the master to furnish the servant with a safe place in which to work, if, at the time his death was occasioned, he was free from contributory negligence.

Same—Action by Parent—Dependence—Evidence—Instructions.*—There was, in the trial of an action by a mother for the homicide of her son, no error in charging the jury that she could not recover without showing that he contributed to her support. An instruction to this effect did not necessarily negative the proposition that it was also essential for her to prove that she was dependent upon the son; and the court's omission to charge upon the subject of dependence will not be held cause for a new trial, when it appears from undisputed evidence that the mother was in fact dependent upon the deceased.

Pleading—Amendments—Case at Bar.—The amendments to the plaintiff's petition cured the defects pointed out by the defendant's special demurrer; there was no material omission in stating to the jury the defendant's contentions; the requests to charge were substantially covered by the general charge given to the jury, which, as a whole, fully and fairly submitted to them the issues involved; the grounds of the motion for a new trial relating to the rejection of evidence present no sufficient reason for reversing the judgment below; and the evidence introduced at the trial, though conflicting, warranted the verdict.

(Syllabus by the Court.)

*See notes at end of case.

Middle Georgia & A. Ry. Co. *v.* Barnett

ERROR by defendant from Putnam county superior court. *Affirmed.*

W. B. Wingfield and *Watkins & Dean*, for plaintiff in error.

Hoke Smith, *H. C. Peeples*, and *W. F. Jenkins & Son*, for defendant in error.

LUMPKIN, P. J. This was an action brought by Mrs. Lucinda C. Barnett against the Middle Georgia & Atlantic Railway Company for the homicide of her minor son, who was in the employment of the defendant as a brakeman. The alleged negligence on the part of the company upon which the plaintiff claimed the right to recover was that it left an open drain under its track in one of its yards, where cars had to be coupled and uncoupled, and switched back and forth; it being insisted that such drain, in this condition, was unsafe and dangerous to life, and that it was the duty of the company to have properly covered it up. The evidence was conflicting. That offered in behalf of the plaintiff tended to show that her deceased son, while engaged in the discharge of his duties as brakeman, and without fault on his part, stepped into this drain at night, and was run down and killed by a moving car of the defendant. The evidence for the latter tended to show that the drain under the track was not a contributing cause to the death of the plaintiff's son, or, if it was, that he himself was at fault, and contributed to the injury. The homicide occurred at night, and the parties were at issue as to whether or not the deceased was using a lighted lantern at the time of the catastrophe. It was also a disputed question whether the deceased knew of the existence of the drain, or was sufficiently acquainted with the place and its surroundings to be fairly chargeable with knowledge of the fact that it was there. There was a verdict for the plaintiff. The defendant made a motion for a new trial on various grounds, which was overruled, and it excepted. The foregoing brief statement, in connection with the additional facts hereinafter set forth, will be sufficient to an understanding of the following discussion of the material question presented for decision.

Case Stated.

1. The court, among other things, charged that "a witness may be impeached by disproving the facts testified to by him at the time of the trial. He may be restored to your confidence by a corroboration of the facts testified to by him at the time of the trial.

Impeachment of Witness.

Whether a witness has been impeached, and, if impeached, whether he has been restored to your confidence, are questions of fact for the jury to determine." Strictly speaking, there can be no such thing as disproving a fact. A fact is something which is true, and it can never be untrue. The real meaning of the phrase that "a witness may be impeached by disproving the facts testified to by him" is that he may be impeached by proving that the statements made by him in his testimony are not the truth; and, obviously, it must until the end of a trial be an open question for the jury to solve whether or not the testimony of any witness as to any particular matter has been disproved. They, at last, must determine what is the truth of a disputed issue of fact; and, where two witnesses are directly in conflict as to a matter concerning which each swears positively and deliberately, the verdict necessarily settles which of the two has been impeached by disproving what he stated on the stand. Of course, a falsehood sworn to by a witness can never by any amount of corroboration of his testimony as to other matters be converted into truth. We therefore understand the rule to be that, when two witnesses are directly in conflict, the jury may take into consideration evidence corroborating either as to any material matter, with a view to determining which is to be credited. The charge above quoted was substantially in accord with what is here laid down. Our understanding of its meaning is that the jury were to take into consideration the testimony of each and every witness, ascertain to what extent it was corroborated as to material matters, and then decide, upon a fair review of all the evidence, what the truth of the case really was. We have no reason to apprehend that the jury were misled by the instructions given them upon this subject, or failed to fully and correctly grasp the meaning of the same.

2. It is well settled that an employee assumes the risks usually incident to the work in which he is engaged, and also that a master is generally under a duty of providing his employee with a safe place in which to work. These two rules of law are not inharmonious. A servant, of course, takes the risk of being injured by defects when he knows, or, in the exercise of ordinary diligence, ought to have known, of their existence, and yet, in disregard of the dangers arising therefrom, goes on with his work. In so doing, he assumes the hazards attendant upon such defects; but he does not assume risk of

Death of Employee—Dangerous Premises—Assumption of Risk.

injury from defects of which he does not know, and with knowledge of which he is not chargeable. The duty of the master to furnish a safe place for the servant to work in is not absolute and unqualified. Some kinds of work are necessarily attended with dangers against which the master cannot by any degree of diligence provide. In such case the law does not require of him impossibilities; but if, by exercising ordinary care, he can make safe the place wherein the servant is to labor, it is the master's duty to do so. In any given case the jury must determine from the evidence what were the risks incident to the work in hand; and, in arriving at a conclusion upon this subject, the ignorance or knowledge of the servant as to the existence of a defect, and, if he was ignorant, whether his ignorance was or was not due to his own negligence, are all matters for determination by the jury. So, also, it is for them to determine from all the facts and circumstances in evidence whether or not the master, in the exercise of ordinary diligence, could have provided the employee with a safe place in which to do his work, and, if so, whether or not the master was negligent in failing to perform the duty of so doing. As we understand the charge given in the present case, it was, as to these particular subjects, on the line just indicated. The judge instructed the jury that the plaintiff's deceased son took the usual risks incident to his employment; and while, in this same connection, the judge also charged concerning the master's duty to furnish the servant with a safe place in which to work, the instruction given left the jury free to determine whether that duty was incumbent upon the defendant in the case at bar; and they were expressly instructed that the right of the plaintiff to recover depended, not only upon her showing the company to have been negligent in the manner charged, but also upon her proving, in addition, that there was no contributory negligence on the part of her son in bringing about his death. The court's instructions, thus carefully guarded, certainly contained nothing of which the defendant could justly complain.

3. The judge further instructed the jury that, before Mrs. Barnett would be entitled to a recovery, it must appear that the deceased contributed while in life to her support. It was alleged that this charge was erroneous, "in that the court placed the right of plaintiff to recover solely upon the ground that, if the deceased contributed to the support of plaintiff, her right of recovery would be complete"; and the exception

Same—Action by Parent—Dependence—Evidence—Instructions.

to the charge further alleged that "the court should have further instructed the jury that her right to recover would depend also upon the fact that she was wholly or in part dependent upon deceased for support." The charge complained of is, as an abstract proposition, unquestionably correct, for a mother cannot recover for the homicide of a son without showing that he contributed to her support. This charge did not necessarily negative the proposition that it was also essential for the plaintiff to prove that she was dependent upon her son for a support. According to the decision of this court in Clay *v.* Railroad Co., 84 Ga. 345, 10 S. E. 967, a mother cannot maintain an action of this kind without proving both contribution and dependence. Counsel for the defendant in error asked permission to review that decision. It is unnecessary, however, to do so for the purpose of the present case, for it appears from undisputed testimony that Mrs. Barnett was materially dependent upon her deceased son for a support. This being so the verdict should not be disturbed even if the charge above quoted was capable of the construction placed upon it by counsel for the railway company, and without regard to the question whether the decision in Clay's Case is, as to the matter in hand, sound or not; it being plain from the record that the real matters in dispute at the trial related to other questions, and that there was no dispute on the question of the mother's dependence by which the finding of the jury could have been affected.

4. The remaining questions are of no great importance. As originally filed, the plaintiff's petition was in some respects defective; but, after the defendant had demurred to the same, the defects were cured by appropriate amendments. The motion for a new trial alleged error in failing to state with sufficient fullness the defendant's contentions; but we do not think the charge of the court is open to this criticism, for it presented the matters in dispute in a very clear light. The defendant presented numerous written requests to charge, all of which were substantially covered by the general charge given to the jury; and, as a whole, it fairly and fully submitted to them the issues involved. Some of the grounds of the motion complained of alleged errors in rejecting evidence. There is no merit in any of these grounds, with possibly a single exception; and the admissibility of the testimony therein referred to was at least doubtful, and of no controlling weight in

Pleading—Amendments—Case at Bar.

the determination of the main issue. As above stated, the evidence was conflicting. It apparently preponderated in favor of the defendant, but the verdict was approved by the trial judge, and, as it was directly supported by competent evidence, this court would not be warranted in setting it aside. Judgment affirmed. All the justices concurring.

NOTES.

Action for Death of Child—Georgia Statute.—The Georgia statute does not give a right of recovery to the father or mother unless he or she was dependent upon the child for support, and the child, before his death, contributed to the support of such parent. Clay *v.* Central R., etc., Co., 84 Ga. 345. See also Smith *v.* East, etc., R. Co., 84 Ga. 183; Ellison *v.* Georgia R. Co., 87 Ga. 691; Augusta R. Co. *v.* Glover, 92 Ga. 132; Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369.

Until this statute, which was passed in 1887, a parent could only recover for loss of services during the child's minority. Perry *v.* Georgia, R., etc., Co., 85 Ga. 193. See also McDowell *v.* Georgia R. Co., 60 Ga. 320; Chick *v.* Southwestern R. Co., 57 Ga. 357; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 31 Am. & Eng. R. Cas. 352.

Duty of Master to Provide Safe Place to Work.—The rule is well settled that among the positive duties resting upon the master to the servant is the obligation to exercise such reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities, and a reasonably safe place in which to work. The negligence of the master in this respect is not one of the perils or risks assumed by the employee in his contract of employment, and he has the right to insist that the master shall strictly comply with his obligations in this respect. South Fla. R. Co. *v.* Weese, 32 Fla. 212, 13 So. Rep. 436; Stewart *v.* Philadelphia, W. & B. R. Co., (Del.) 17 Atl. Rep. 639; O'Neal *v.* Chicago & I. C. R. Co. 132 Ind. 110, 31 N. E. Rep. 669.

And where the service required of an employee is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty. Hannibal & St. J. R. Co. *v.* Fox, 15 Am. & Eng. R. Cas. 325, 31 Kan. 586, 3 Pac. Rep. 320.

LOUISVILLE & N. R. CO.

v.

VICTORY.

(*Court of Appeals of Kentucky, Oct. 15, 1898.*)

Injury to Employee—Defective Road Bed—Negligence—Sufficiency of Evidence.—There was evidence tending to show that the derailment was caused by a collision with a calf; and the evidence as to the road bed being defective was not positive, consisting only of the statements, that, upon a very cursory examination, the ties did not seem very sound, and that some of them were a little decayed on the ends. *Held*, that there was no evidence to show that the track was in a dangerous condition at such point, or that the company was chargeable with notice that it was in a dangerously defective condition.

Same—Burden of Proof.*—The burden of proving negligence having been on plaintiff, and it not appearing that defendant was negligent in regard to the road bed—the only act of negligence specified in the pleadings, the verdict for plaintiff was against the evidence.

APPEAL by defendant from Hopkins county circuit court. *Reversed.*

B. D. Warfield, *Gordon & Gordon*, and *H. W. Bruce*, for appellant.

James Breathitt, *W. T. Fowler*, and *Petrie & Downer*, for appellee.

DU RELLE, J. The appellee brought suit against appellant company, alleging that his intestate, who was a brakeman, received injuries, from which he died, while engaged upon a freight train of appellant; that the "train was thrown from the track near Robard's Station, in Henderson county, Ky., and the said C. C. McGary * * * received serious bodily injuries, from which he died; that 22 cars were thrown from the track in the said wreck, and that the derailment of the said train was caused by the

Case Stated.

*See note at end of case.

defective condition of the roadbed at the point where said train was thrown from the track; that there had been, a few days prior to said accident, a slipping of the earth or roadbed from under the track, and that on the day of said accident the section boss and hands were at work at said point; that, in addition to the defective condition of said roadbed, the right of way at said point had grown up with weeds and bushes close up to said railroad track, and that old logs and cross-ties were piled up close to said road, and that said train at said time was running at a dangerous and reckless rate of speed, and came in contact with a yearling calf, which could not be seen on account of said bushes, weeds, and logs. The plaintiff charges that said accident was caused by the gross negligence of said defendant, its agents and servants, in not keeping said roadbed in a safe condition, and by the gross negligence of the agents and servants of the defendant superior to plaintiff's decedent in authority, in the running of said train at a dangerous and reckless speed at the point of said wreck, and over and upon said calf, and upon allowing said weeds, bushes, and logs to lie so near the roadbed as to obstruct the view of said agents and servants who operated said train. The plaintiff says that the condition of said roadbed had been well known to the defendant, and its servants and agents, for some days prior to said accident, and in sufficient time to have put said roadbed in safe condition prior to said accident; and he further charges that the dangerous condition of said roadbed was well known to defendant's agents and servants, whose duty it was to keep said roadbed in proper condition, and that its dangerous condition was known to them for sufficient length of time to have put same in repair in time to have avoided said accident and injury to the plaintiff's decedent; and he further charges that the dangerous and unsafe condition of said roadbed was well known to the agents and servants of the defendant in charge of and running said train, and who were superior in authority to said decedent." By an amended petition, the plaintiff said that he was in error in stating that, at the point where his intestate was injured, weeds and bushes had been permitted by defendant to grow upon the side of the track so as to obstruct the view of the operators of defendant's train; "but plaintiff now charges that at the point where said C. C. McGary was injured, and from which he died, that the track of defendant's road is straight for a great distance, and that there was nothing to prevent the agents of defendant who

were operating said train from seeing any object on the track for a great distance at that point. Plaintiff further charges that a lot of cattle came upon defendant's track at or about said point of wreck, and defendant's engineer negligently failed to blow the whistle in order to scare said cattle from the track, and recklessly ran the engine and cars over one of said lot of cattle, and by reason of which, and the rotten and unsound condition of the cross-ties at said point, the rails spread, and the spikes were drawn from the rotten ties, and a number of cars were ditched or overturned, and in the said wreck said McGary received fatal injuries."

By the first paragraph of the answer all the material averments of the petition as amended were traversed. By the second paragraph it was averred that the derailment of the cars and the accident to plaintiff's intestate "was caused by a yearling calf coming upon its track immediately in front of its engine, and so near to the same that it was impossible, from the time it so appeared upon the track, for its engineer and trainmen to check the train or stop it and prevent striking same; that its said engine did strike and run over said calf, and that the body of same went under its engine and cars, and caused the cars to jump the rails and leave the track; that it was impossible, from the time the engineer first saw the calf upon the track, or saw that it would come upon the track, by reason of its nearness to him, to stop or check the train or avoid striking it; that the coming of the calf upon the track was not or could not have been foreseen nor expected in time to have avoided striking it, and the consequent derailment of its train; that the running over of the calf and the derailment of the train were unavoidable; that the injury, suffering, and death of plaintiff's intestate was caused under and by these facts and circumstances, and was unavoidable."

By the reply, appellee stated "that he does not know to what extent the wreck of defendant's train in which the said C. C. McGary received injuries that resulted in his death was caused by the calf, which defendant admits was struck by its said train, and over which said train or a portion of same passed on that occasion. He believes that the running over said calf by said train, as described in defendant's answer, did cause in part said wreck, and the subsequent injuries to plaintiff's intestate, but he denies that said wreck, and the injuries to plaintiff received therein, were caused alone by said striking and running over said calf." After a denial that it was impossible for the engineer to have checked the

train in time to prevent striking the calf, the reply continues: "He denies that the running over said calf as aforesaid by itself caused the cars to jump the rails and leave the track, although that did, as he believes, help to produce that result."

It will be observed from the pleadings that the original theory of appellee that the accident was caused in part by permitting weeds and bushes to grow so near the track that the engineer could not see cattle about to come upon the track was abandoned, and the right to recovery was sought to be established upon the ground—First, that the roadbed was in a defective condition by reason of a slipping of the earth from under the track prior to the accident, of which appellant knew or could have known; and, second, that the engineer negligently failed to give the cattle alarm when he saw, or should have seen, cattle upon the track in front of his engine. At the conclusion of appellee's testimony a peremptory instruction was asked for and refused, and it is mainly upon this refusal and upon the ground that the verdict was flagrantly against the evidence, that a reversal is now sought of the judgment which was rendered against appellant.

No evidence was introduced by appellee to show that the engineer failed to give the cattle alarm for the cattle which appeared upon the track, but, upon the contrary, several of appellee's own witnesses proved that he gave such alarm. Nor was any evidence introduced to show that the train was running at a dangerous or unusual rate of speed. The case turned—and, by the instructions, was made to turn—solely upon the question whether the roadbed was in a defective condition at the time of the accident. Upon this point the testimony introduced on behalf of appellee tended to show that the track was in good order, with perhaps one exception, to be noted hereafter. A fellow brakeman of the intestate, no longer an employee of the company, testified that the cattle alarm was given and brakes called for by the engineer, and that he saw a cow standing some distance ahead of the engine, beside the track; that after setting a brake he saw the cow go off the track, and immediately thereafter he saw a car turn across the track, "and from that on the wreck commenced," the other cars piling up against it, the train then running at the usual rate of speed,—between 25 and 30 miles an hour. This witness testified that the passenger train had passed over this track a few minutes before; that he had ridden over this track on his train on that same morning, and the track seemed all right. Of the other witnesses for appel-

lee, those who were in sight of the wreck at the time it occurred testified to the cattle alarm being given, and all testified as to a part of the remains of the calf being found where it was struck, while the hide and a part of the shoulder had been carried with the truck of one of the cars to a point near where the wreck occurred, a distance of from 40 to 60 yards. Their testimony showed that seven or eight cars had been piled up together; that the rails were bent and torn loose; and that some rails, with the ties attached to them, had been slipped to the west side,—the side upon which most of the cars went off. Upon the west side it appeared that the embankment had been considerably torn away. The only evidence which, in any sense, could be construed as tending to show that the track was in bad condition before the wreck, was the statement of the witness Eakins, who was asked: "Please state the condition of the cross-ties, and the place where they had slipped, and where the track was torn up; I mean their condition as to soundness or the reverse,"—to which he answered: "Some of them were not very sound; I did not examine them very closely; they were old ties; a good many were mashed up,"—and the statement of the witness Henry A. Book: "The ties—some of them—seemed to be a little decayed on the ends where the trucks cut them off."

Is this sufficient evidence to support a verdict obtained solely upon the ground that appellant company's track at that point was in bad condition before the wreck, of which condition it knew, or by the exercise of reasonable care might have known, in time to have taken measures to prevent the accident? We think not. The fact that some of the ties under the wreck seemed to a witness not to be very sound, upon a very cursory examination,—or, rather, upon mere casual observation,—is not evidence, in our judgment, in support of the proposition that the track was in a defective condition at that point before the wreck. This same witness states that a good many of them were mashed up, and, as matter of course, they did not look as well in that condition as new ties freshly laid in a track. Nor does the fact that the witness Book states that some of the ties seemed to be a little decayed on the ends where the trucks cut them off show that they were unsound where the rails were spiked to them. It is matter of common knowledge that ties might be decayed on the ends, and yet perfectly sound, where soundness was necessary. This being so, we

Injury to Employee—Defective Road Bed—Negligence—Sufficiency of Evidence.

are forced to the conclusion that there was no evidence before the jury that the track, at the point where the wreck took place, was in a dangerously defective condition, of which the company knew, or, by the exercise of reasonable diligence, could have known, in time to prevent the accident.

The burden was upon the plaintiff to show the negligence averred. Instead of showing facts from which the negligence averred on the part of the company might reasonably be inferred, he has presented a state of facts from which we may, with equal plausibility, infer either negligence or reasonable care on the part of the company. Under this state of fact, as the pleadings appear in this case, the verdict appears to us to be flagrantly against the evidence. Hughes *v.* Railroad Co., 91 Ky. 531, 16 S. W. 275; Wintuska *v.* Railroad Co. (Ky.) 20 S. W. 819; Railway Co. *v.* Lewis (Ky.) 38 S. W. 482; Johnston *v.* Railway Co. (Ky.) 30 S. W. 415. The case of Railroad Co. *v.* Ritter, 12 Ky. Law Rep. 385, has no application to the case at bar, for in this case the plaintiff presented a definite issue of negligence, of which the appellant company was averred to have been guilty in a particular specified manner. Having elected to specify wherein the negligence consisted upon which he bases his claim for recovery, he cannot, under these pleadings, recover by showing a different character of negligence. See McCain *v.* Railroad Co., 13 Ky. Law Rep. 334. And in Greer *v.* Railroad Co., 94 Ky. 169, 21 S. W. 649, it was held to be error to admit evidence as to acts of negligence in addition to those averred in the pleadings. So, granting that the derailment of the train, resulting in the death of plaintiff's intestate, was evidence from which negligence might be presumed, it nevertheless does not support the averment in the petition of negligence in permitting the track to remain in an unsafe and dangerous condition. For the reasons given the judgment is reversed, and the cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

Same—Burden of Proof.

NOTE.

Negligence—Burden of Proof.—He who seeks a recovery for an injury caused by the alleged negligence of the defendant must prove not only that he has suffered loss by the defendant's act or omission,

Note

but also that the act or omission was a violation of duty required of him. Hot Springs R. Co. *v.* Newman, 36 Ark. 607; Behrens *v.* Kansas Pac. R. Co., 8 Am. & Eng. R. Cas. 184, 5 Colo. 400; Case *v.* Chicago, R. I. & P. R. Co., 69 Iowa 449, 29 N. W. Rep. 596; affirming 64 Iowa 762; State *v.* Philadelphia, W. & B. R. Co., 15 Am. & Eng. R. Cas. 481, 60 Md. 555; Witting *v.* St. Louis & S. F. R. Co., 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743; O'Malley *v.* Missouri Pac. R. Co., 53 Am. & Eng. R. Cas. 280, 113 Mo. 319, 20 S. W. Rep. 1079; Leduke *v.* St. Louis & I. M. R. Co., 4 Mo. App. 485; Myers *v.* Snyder, Bright,N. P. (Pa.) 489; Norfolk & W. R. Co. *v.* Ferguson, 79 Va. 241; Sheeler *v.* Chesapeake & O. R. Co., 81 Va. 188; Richmond & D. R. Co. *v.* Moffett, 88 Va. 785, 14 S. E. Rep. 370; Steffen *v.* Chicago & N. W. R. Co., 46 Wis. 259, 21 Am. Ry. Rep. 385.

And for this purpose he must show the circumstances under which it occurred. If from the circumstances it appears that the fault was mutual, or that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover. Denver, S. P. & P. R. Co. *v.* Pickard, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163, 6 Pac. Rep. 149.

The *onus probandi* with respect to something more than simple negligence is upon the plaintiff, and there should therefore be made apparent something more than a mere conjectural probability of the commission of the wrong imputed; there must be some element of moral certainty and exclusion of reasonable doubt. Magnin *v.* Dinsmore, 8 J. & S. (N. Y.) 512.

If the evidence shows that the injury may have resulted from one or two causes, only one of which was due to defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and it is not competent for the court to leave the question to the jury. Hughes *v.* Cincinnati Southern R. Co., 91 Ky. 526, 16 S. W. Rep. 275.

Where the evidence leaves the cause of an injury unproved, it cannot be attributed to defendant's negligence or fault. Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. Rep. 566.

See also *note*, 11 Am.& Eng. R. Cas., N. S., 868.

LAKE SHORE & M. S. RY. CO.

v.

ANDREWS.

(*Supreme Court of Ohio, May 10th, 1898.*)

Injury to Employee—Negligence—Evidence.*—In the absence of direct evidence in its support, an allegation that one sustained injuries by reason of the negligence of the defendant is not sustained by proof of circumstances from which the fact that his injuries were so sustained is not a more natural inference than any other.

(Syllabus by the Court.)

ERROR by defendant to Lucas county circuit court. *Reversed.*

This is a petition in error to reverse a judgment of the circuit court affirming a judgment of the court of common pleas awarding damages to Andrews, as administrator, for negligently causing the death of his intestate. The substance of the original petition of the administrator is that Barton was a brakeman in the service of the company, and upon the night of his death was head brakeman on a freight train; that it was his duty to be upon the front end of the train, or in the cab, and from that position to keep a constant lookout for the rear end of the train during the passing of a grade which the train had just completed; that the night was dark and stormy, and that the observation of the light, at the rear end of the train, was rendered more difficult because, in making up the train, passenger cars of greater width than the freight cars had been placed between the locomotive and the caboose; that while, in the discharge of his duty, he was leaning out of the gangway between the engine and tender, to see the lights on the side of the caboose, his head struck the casing of the bridge which the company negligently maintained at a height of eight or nine feet above the level of the bridge, and so near to the train as to be a source of danger, of which the deceased had no knowledge.

*See Louisville & N. R. Co. *v.* Victory (Ky.) *ante* and *note*.

The answer admitted that the deceased sustained fatal injuries at the time and place alleged, but denied all allegations of negligence, and averred that the injuries were sustained by reason of the want of care on the part of the decedent. The allegation that the deceased was negligent was denied by reply. The facts clearly established by the evidence are that the bridge was in no respect out of repair, but was in the condition in which it had been from the time of its erection, about eight years before. The train on which Barton was head brakeman passed over it very rapidly, and while it was passing he came in collision with the casing which inclosed the truss, receiving injuries which were immediately fatal. The fact of such collision was shown by marks upon the casing commencing near the end at which the train entered the bridge, and about two feet from the top of the casing, the marks descending from that point to the further end of the bridge, near which the body was found. Barton had been employed by the company as brakeman about six months on this and another division, and had passed over the bridge something over twenty times. On the night of his death the engineer and fireman saw him standing in the gangway between the locomotive and tender shortly before they reached the bridge, but he was not seen by any one thereafter until he was found dead. The casing was something more than two feet from the train. At the conclusion of the plaintiff's evidence the court was requested to direct a verdict for the company, which was denied. After a verdict in favor of the administrator, the company moved for a new trial, on the ground, among others, that the verdict was not sustained by the evidence, and was contrary to law, and this motion was overruled.

Potter & Emery, for plaintiff in error.

George B. Boone and *J. K. Hamilton*, for defendant in error.

SHAUCK, J. (after stating the facts). It is not believed to be necessary to repeat here the familiar rules of law concerning liability for negligence. The case is susceptible of clear solution by the application of one of those rules to the evidence in the record. To reach at once the point on which our decision is to be based, it is assumed that the company was negligent in maintaining the bridge with the casing so near the train, and that the deceased did not, with knowledge, acquiesce in such negligence so as to defeat the action. The

theory presented in the original petition and in the argument of counsel is that Barton was in the discharge of his duty to watch the rear end of the train to see if it had parted while descending the grade, and while so engaged was leaning from the side of the tender, looking for the light on the side of the caboose, in the rear of the wider coaches, and while so engaged he was killed. The theory is not supported by any evidence whatever. Barton was last seen alive shortly before the locomotive reached the bridge, when he was standing on the gangway or platform between the engine and tender, with his lantern on the floor by his side. After the train had passed the bridge it was noticed that, while his lantern was still there, he had disappeared. No one saw him leaning over the engine or make any effort to see the rear of the train. No other evidence in the case suggests the manner of his death except the marks on the casing. Certainly an allegation of fact may be established by circumstantial evidence, but the circumstances, to have that effect, must be such as to make the fact alleged appear more probable than any other. The fact in issue must be the most natural inference from the facts proved. Not only did the circumstances here disclosed fail to make it appear that Barton's death occurred in the manner alleged, but, since the point at which his head struck the casing was certainly not more—it seems to have been less—than two feet above the level of the platform upon which he was standing when last seen, the natural inference is that he fell from the train. The circumstances fail to show that the death of Barton was due to the negligence alleged against the company. A recovery upon such evidence cannot be sustained while it is held that the employer is not the insurer of the safety of the employee. A verdict for the defendant should have been directed as requested. Judgments of the circuit court and court of common pleas reversed.

AUGUSTA SOUTHERN R. CO.

v.

MCDADE.

(*Supreme Court of Georgia, July 23, 1898.*)

Jurors.—Neither the stockholders nor the employees of a railroad company which had leased the property and franchises of another such company, after it had incurred a liability, are, because of their being such stockholders and employees, and for this reason alone, disqualified from serving as jurors on the trial of an action against the latter. In order to render these persons incompetent, it should further appear that because of their connection with the lessee company, or otherwise, they have some interest in the result of the trial. (a)Were this not so, it does not appear that any juror in the present case was excluded from the panel by reason of alleged disqualification.

Judges.—The fact that the judge of a city court manages the financial affairs of his county does not disqualify him from presiding in an action against a railroad company of which that county is a stockholder, the judge himself having no personal or pecuniary interest in the result of such an action.

Direction of Verdict.—Unless the defendant's nonliability followed as a necessary legal conclusion from a given state of facts, it would not, in the trial of an action, be proper for the judge to instruct the jury that, under such a state of facts, there could be no recovery for the plaintiff.

Injury to Employee—Assumption of Risk.—What risks are usually incident to a given business must be determined by the jury under the facts and circumstances of each case; and while the judge may properly instruct the jury that, as a general rule, an employee assumes such risks, a refusal to specify particular dangers or perils, and inform the jury that these are within the rule, is right.

Same—Negligence—Burden of Proof.—Proof that a deceased employee of a railroad company, who was killed by the running of its train, was without fault, raises a presumption that the company was in fault. Proof that the servants of the company who were operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. (a) Certain charges complained of in the present case were, though not so worded, in effect as above stated.

Augusta Southern R. Co. *v.* McDade

Same—Statutory Provision.—So much of section 2321 of the Civil Code as is embraced in the phrase "the presumption in all cases being against the company" is inapplicable to a case where a railroad company is sued for the killng of an employee, unless the plaintiff affirmatively shows that the deceased was free from fault; and consequently, on the trial of such a case, the law embodied in this section should not, either literally or substantially, be given in charge to the jury without plainly and distinctly stating the qualification herein indicated.

Death of Son—Right of Mother to Recover.*—In order to warrant a recovery, under section 3828 of the Civil Code, by a mother for the homicide of her child, it must appear, not only that the child contributed to her support, but also that she was dependent upon the child for such support. (a) A charge which eliminates from the consideration of the jury the latter element is inaccurate.

Assignments of Error.—Assignments of error relating to the rejection of evidence cannot be considered when it does not appear what, if any, objection was made thereto when offered. The evidence in the present case requiring a finding that the deceased was an employee of the defendant, the charges relating to this matter, and complained of in the motion for a new trial, were not prejudicial to the latter, and the requests to charge which assumed that the deceased was a volunteer were properly refused.

(Syllabus by the Court.)

ERROR by defendant from city court of Richmond. *Reversed.*

Leonard Phinizy and *J. R. Lamar*, for plaintiff in error.
Boykin Wright and *J. C. C. Black*, for defendant in error.

FISH, J. 1. It appeared that, after plaintiff's son had been killed by the defendant, the Augusta Southern Railroad Company leased in perpetuity its property and franchises to the South Carolina & Georgia Railroad Company. The latter company was not a party to the suit. The trial judge asked the panel of jurors if any of them were stockholders or employees of the lessee company. Certainly, stockholders and employees of the lessee company were not disqualified from serving as jurors on the trial of an action against the lessor company, it not appearing that, by reason of their connection with the lessee company or otherwise, they had any interest in the result of the trial. As no juror, however, was set

Case Stated.

Jurors.

*See Middle Georgia & A. Ry. Co. (Ga.) *ante* and *note*.

aside for the supposed disqualification, no harm was done, and there can be nothing in the assignment of error on this point.

2. One of the grounds of the motion for new trial was that JUDGE EVE, who presided at the trial of the case, was disqualified by reason of the fact that he was judge of the city court of Richmond county, and commissioner of roads and revenues for it, and that such county was the owner of 13 7-16 shares of the capital stock of the defendant company, and that these facts were unknown to defendant's counsel at the time of the trial. It was not pretended that JUDGE EVE had any personal or pecuniary interest in the result of the action, and the mere fact that he, by virtue of being the judge of the city court of Richmond county, managed its financial affairs, did not disqualify him from presiding in the case. Even if it had, there was no showing that the officers of the defendant company were ignorant of the facts when the case was tried.

Judges.

3. Another ground of the motion was the refusal of the judge to give in charge to the jury the following written request: "If you believe from the evidence that plaintiff's son met his death by being tripped or thrown in passing out between the cars, after the coupling had been made, and that it was impossible to have stopped the engine and prevent the homicide, then I charge you that the plaintiff cannot recover in this case, and your verdict should be for the defendant." There was no error in refusing to give this request in charge. The nonliability of the defendant was not a necessary legal conclusion from the hypothetical facts stated. Such facts may have existed, and yet the defendant may have been liable. The negligence of the defendant may have caused plaintiff's son to trip and fall, or it may have been defendant's fault that the engine could not be stopped and the homicide prevented. These were matters for the jury's consideration.

Direction of Verdict.

4. Another ground of the motion for new trial was the refusal to give in charge the following written request: "I charge you, further, that the danger of being tripped up or thrown down by the rail in coupling cars is one of the risks incidental to such service; and, when plaintiff's son attempted to make this coupling, he assumed all the risks and dangers incident to the same; and if his death resulted from his taking such risks, and defendant's agents were guilty of no negligence, or neglect, or omission of duty, then the plain-

Injury to Employee—Assumption of Risk.

tiff cannot recover in this case, and your verdict should be for the defendant." The court was right in refusing to charge this request. It is a familiar rule that "a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." Civ. Code, § 2612. But what particular perils are incident to a given business must be determined by the jury, and not by the judge, under all the facts and circumstances of each case. See Railway Co. *v.* Barnett (Ga.) 30 S. E. 771.

5. The court charged the jury as follows: "I charge you that, if plaintiff shows that McDade was not to blame, then the law presumes that the railroad was to blame; or, if the plaintiff shows that the railroad company or any of its servants were to blame, then the law presumes that McDade was not to blame, and such presumptions in favor of the plaintiff remain until they are rebutted and overcome by evidence." Also, "if you believe that McDade did not cause the injury by his fault, the onus is shifted to the railroad company to show that its agents were in the exercise of all reasonable care and diligence; otherwise, the statutory presumption of negligence would be against the railroad company." Plaintiff in error contends that these charges were erroneous in a suit against a railroad company for the homicide of one alleged to be its employee. A concise statement of the rule as to the burden of proof in cases of this character is that proof that a deceased employee of a railroad company, who was killed by the running of its train, was without fault, raises a presumption that the company was in fault, and proof that the servants of the company who were operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. Railroad Co. *v.* Kenny, 58 Ga. 485; Railroad Co. *v.* Bryans, 77 Ga. 429; Railroad Co. *v.* Small, 80 Ga. 519, 5 S. E. 794; Johnston *v.* Railroad Co., 95 Ga. 685, 22 S. E. 694. The above charges were substantially in accordance with the rule stated.

Same—Negligence—Burden of Proof.

6. The court charged the jury as follows: "Now, gentlemen of the jury, under the laws of Georgia, a railroad company is liable in damages where a person is killed or injured by the running of its trains, unless the company shows that its agents and employees were at the time exercising all ordinary care and diligence." Plaintiff in error contends that this charge was not applicable in a suit for the homicide of an employee of the

Same—Statutory Provision.

railroad company. This court has several times held that, in an action against a railroad company by an employee for personal injuries alleged to have been occasioned by the negligence of a co-employee, no presumption of negligence arises against the company until the plaintiff has affirmatively shown that he himself was free from fault. Railroad Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613; Railroad Co. *v.* Burney, 98 Ga. 1, 26 S. E. 730; Railway Co. *v.* Davis (Ga.) 30 S. E. 262. In the case at bar the burden of proof was upon the plaintiff to make out her case by proving either that the deceased himself was entirely free from fault, or that his death was caused by the negligence of his co-employees. Unless a *prima facie* case was made out by the proof of one or the other of these two propositions, no presumption could arise against the company, and to charge, without qualification, that the company was liable, unless it showed that its agents and employees were at the time exercising all ordinary care and diligence, was error. Following Railroad Co. *v.* Hicks and Railway Co. *v.* Davis, *supra*, we must rule that such error was not cured by the court subsequently charging the correct rule on the subject, without calling attention to the error already committed.

7. Error is assigned upon the following charge of the court: "This suit is brought by the mother of the young man that is claimed to have been killed through the negligence of the company. If the evidence discloses that he substantially contributed to her maintenance, she is entitled to maintain the suit." It is settled that, under the proper constructions of section 3828 of the Civil Code, a mother cannot recover for the homicide of her child unless it appear, not only that the child contributed to her support, but also that she was dependent upon the child for such support. Clay *v.* Railroad Co., 84 Ga. 345, 10 S. E. 967; Railway Co. *v.* Gravitt, 93 Ga. 369, 20 S. E. 550; Smith *v.* Hatcher (Ga.) 29 S. E. 162. As the charge entirely eliminated from the consideration of the jury the necessary element of the mother's dependence upon the child for support, such charge was manifestly erroneous.

Death of Son—Right of Mother to Recover.

Assignments of Error.

8. An elaboration of the eighth headnote would not be profitable.

Judgment reversed. All the justices concurring.

LOUISVILLE & N. R. CO.

v.

COOLEY'S ADM'R.

(*Court of Appeals of Kentucky, Feb. 3, 1899.*)

Construction of Bridges—Negligence.*—It is negligence on the part of a railroad company to have a bridge so constructed that a brakeman cannot with safety stand erect upon cars going over it.

Same—Same—Assumption of Risk.*—And where a brakeman's life is lost in consequence of such negligence, the railroad company cannot relieve itself from liability by simply showing that deceased, before the accident, knew that the bridge was so constructed.

Case at Bar.—In an action for the death of a brakeman, alleged to have resulted from such negligence, there was no evidence showing the heighth of the car upon which deceased was riding, but there was evidence tending to show that the defendant company was guilty of such negligence. *Held*, that the questions of fact involved were for the jury.

Jurisdiction.—The accident occurred in one county, and the action was brought in another county, where was the residence of deceased, and where his personal representative, by whom the action was brought, qualified. *Held*, that the circuit court of the latter county had jurisdiction.

APPEAL by defendant from Lincoln county circuit court. *Affirmed.*

J. W. Alcorn and *Breckenridge & Shelby*, for appellant. *Robt. Harding*, *Harvey Helm*, and *W. G. Welch*, for appellee.

PAYNTER, J. The appellee's intestate was a brakeman on the appellant's freight train, and while sitting on the rear box car, as claimed by the appellee, his head came in contact with the timbers of a bridge, and he was instantly killed. Without going into a discussion of the question, it is sufficient to say that it was negligence on the part of the company to have a bridge con-

Construction of Bridges—Negligence.

*See note at end of case.

structed as was this one. It was a constant peril to the lives of its employees whose duties called them on top of trains. When a brakeman's life is lost in consequence of such negligence, the company cannot excuse itself by simply showing that he knew, before receiving the injury, the bridge was so low that he could not pass over it with safety while standing on top of the cars. Exigencies or other causes may arise in the discharge of his duties which may cause him to forget the danger with which he is threatened, and thus cause his failure to avoid injury. Cooley was killed on the first day he served as brakeman on the road, between Paris and Maysville; and while the appellant endeavored to show that he had knowledge of the location of the bridge, and the danger attending passing over it, there is no evidence that he knew the exact distance from the top of the car to the overhead timbers. If he failed to measure the exact distance between the top of the car and bridge with his eye, or did so, but failed, after reasonable effort, to get his body in an exact position to avoid a collision with the bridge, it seems to us that the appellant should suffer the loss, and not the intestate's estate.

Same—Same—Assumption of Risk.

It is claimed by appellee that Cooley was sitting on the rear end of, and on top of, a box car, with his back to the bridge, when he was struck on the back of the head by it, and killed. The appellant endeavors to show that, just before getting to the bridge, he stood up on the car, and, as he was being pulled down by a brakeman to save him from the injury, the accident took place. There is evidence of persons who worked on the road tending to show that it was not safe for a brakeman to pass over the bridge on a box car while sitting on it, with his feet hanging over its sides, and that it was necessary to lie down on the top of the car to avoid injury from the bridge. There is no evidence in this case to show the height of the car upon which Cooley was killed; but Anderson, master of trains on appellant's road, and a witness for the appellant, said the height of an ordinary box car varies from 12 feet 5 inches to about 13 feet 10 inches. The distance from the top of the rail to the overhead timbers of the bridge is 16 feet and 1 inch. A simple calculation shows that it was dangerous for a man of Cooley's height (6 feet 1 inch), to even pass over the bridge while sitting on the end of some of the box cars in use on the appellant's road; and, in view of the character of his injury and other

facts developed in the record, a fair-minded jury might have given but little weight to the evidence of the rear brakeman. The facts in this case are not exactly as those in the Sampson Case, 97 Ky. 65, 30 S. W. 12. In fact, we rarely find two cases where the facts are exactly similar; but the doctrine enunciated in the Sampson Case is equally applicable to this case, and therefore we think the court properly instructed the jury. We are of the opinion the court was authorized, from the evidence in the case, to submit the questions of fact to the jury; and, indeed, we are not prepared to say the jury was not authorized by the evidence to return the verdict which it did.

Case at Bar.

The accident occurred in Bourbon county, and the residence of the intestate was in Lincoln county, where the personal representative qualified; and we are of the opinion that the circuit court of the latter county had jurisdiction of the action. Sherrill *v.* Railway Co., 89 Ky. 302, 12 S. W. 465; Harper *v.* Railroad Co., 90 Ky. 359, 14 S. W. 346; Railroad Co. *v.* Heath's Adm'r, 87 Ky. 655, 9 S. W. 832. The action was properly brought in Lincoln county, under section 73, Civ. Code Prac., as was determined in the cases cited. The judgment is affirmed.

Jurisdiction.

NOTE.

Injuries to Employee—Overhead Structure—Negligence—Assumption of Risk.—While defendant's proposition that "it is not negligence in a railroad company to construct or permit to be constructed overhead hanging bridges, etc., over its tracks, so low as not to permit a brakeman to stand upright on the top of a box car," might be true, in some special case, under exceptional circumstances, it is certainly not true as a general proposition. On the other hand, were it true that if a brakeman knew, or was presumed to know, of the existence of such a construction, he would be held, as a general rule, to have assumed the risk of injury therefrom, it is not true that the mere fact of such knowledge carries with it necessarily, and on all occasions, and under all circumstances, the cutting off of the remedy for injuries received by him from such constructions. Gusman *et al. v.* Caffery Cent. Refinery & Railroad Co., Limited, *et al.*, 8 Am. & Eng. R. Cas., N. S., 463. See also *note* to this case, *Id.* 470 *et seq.*

HAFFNER'S ADM'R.

v.

CHESAPEAKE & O. RY. CO.

(*Supreme Court of Appeals of Virginia, Dec. 7, 1898.*)

Injury to Brakeman--Low Bridge—Contributory Negligence.*—Deceased, a brakeman, was struck on the head by a low bridge, under which the train was passing, and the dangerous character of which was known to him. The injury would have been avoided had not deceased raised his head just as the customary signal to apply the brakes was given. *Held*, that contributory negligence on the part of deceased precluded recovery for his death.

APPEAL by plaintiff from James City county and city of Williamsburg circuit court. *Affirmed.*

N. S. Henly and *L. L. Lewis*, for appellant.
H. T. Wickham and *H. Taylor, Jr.*, for appellee.

KEITH, P. This is a writ of error to a judgment of the circuit court of James City county and the city of Williamsburg, and is the sequel to the case of Railway Co. *v.* Hafner's Adm'r, 90 Va. 621, 19 S. E. 166.

At the first trial the jury found a verdict for the plaintiff, and the railway company brought the case to this court, where it was reversed, and the verdict and judgment set aside as being contrary to the law and the evidence, the court holding that the contributory negligence of the plaintiff's intestate was the proximate cause of his injury. The case was remanded for a trial *de novo*, and upon that trial the jury found a verdict for the plaintiff, subject to the defendant's demurrer to evidence, and upon that demurrer the circuit court entered judgment for the defendant. Thereupon Haffner's administrator obtained a writ of error to this court.

When the case was reversed and remanded upon the former hearing, it was sent back to be tried upon such evidence as might be adduced before the jury; and, in the event

*See Louisville & N. R. Co. *v.* Cooley's Adm'r. (Ky., 1899), *ante*, and *note*.

of a substantial change in the facts, a new decision as applicable to them would have been required, and the former decision would cease to be the law of the case; for it is clear "that a party on a retrial *de novo* may introduce new evidence and establish an entirely different state of facts, to conform to which is no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one, as suited to the new phase of the controversy. But even then the former decision, so far as applicable, will be adhered to." Wells, Res Adj. § 619, and Carper's Adm'r *v.* Railway Co., 95 Va. 45, 27 S. E. 813.

Upon the former trial the court deduced the following facts from the evidence: "That the deceased had been employed by the R. & A. R. R. as brakeman four months before he applied for employment with the plaintiff in error company. Upon application to the plaintiff in error company for employment, he was given a free pass over the road from Charlottesville to Newport News, and required to inform himself of his duties and the character of the road. He was a man of full age, with no defect in his eyesight or hearing. He frequently passed under this bridge by day and by night, safely, in the discharge of his duty, without injury. On the occasion of the accident which caused his death, he was struck on the head (as is stated by a witness who stood on the bridge, and says he heard the blow) by the sill or stringer of the bridge on the west side of the bridge, the train going west at the time of the accident; so that he had passed in safety under three sills of the four supporting the bridge. He stooped or lowered his head under it, and raised it just before he got from under it. The character of the injury received from the collision with this sill was never ascertained, because, descending by the stepladder, he fell off the car, and across the track, and his head was cut in twain by the wheels of the car, and his body otherwise badly mutilated. The bridge is shown to have been a dangerous one, being only 28½ inches above the car, which dangerous character was known to the company, and was also known to the said brakeman. While dangerous in character, its danger could, however, be avoided by stooping low enough in passing under it, as is shown by the number of times he passed under it, and the number of times others pass and repass without injury. The train in question was halting at the station to take the siding, to allow a meeting train, presently due, to have the main track. It is alleged that there was a

call for brakes here as the station was reached. The evidence is conflicting on this point, it being otherwise testified to that the long whistle sounded was simply a blow for the station; but we must consider this case, as other cases upon a demurrer to the evidence, under the well-known rule of this court prescribed by statute."

Every fact here stated and relied upon by the court as controlling its decision is established by the evidence in the record before us, which is substantially identical with that considered by the court upon the former hearing, except that the evidence upon this trial is to the effect that the deceased came to his death by a collision with a stringer on the eastern side of the bridge, instead of that upon the west side of the bridge, the train at the time moving from the east to the west. This difference we do not think material to the decision. The decedent was held to have been guilty of negligence upon the former trial, because, having bowed his head and passed in safety from the eastern edge of the bridge under three sills, he raised his head, and was struck by the fourth sill. In thus raising his head, he was considered as being guilty of contributory negligence, and himself the author of the injury he sustained; and it was no less negligent upon his part to fail to lower his head upon approaching the bridge, resulting, as the evidence now shows, in death from a collision with the first, or eastern, sill.

It is negligence for a railroad company to operate its road with such a bridge; but, "while dangerous in character, its danger could be avoided by stooping low enough in passing under it, as is shown by the number of times he (plaintiff's intestate) passed under it, and the number of times others passed and repassed without injury." Railway Co. *v.* Haffner's Adm'r, 90 Va. 622, 19 S. E. 166.

The evidence as to the age, experience, knowledge, and means of knowledge, of plaintiff in error's intestate, is in this record just what it was when the case was before this court upon a former occasion. The employment blank was then in the record, and was considered along with other facts in the case; and if the case were now before us for the first time, and if that employment blank contained the only information imparted to the employees of the railway company as to the dangerous character of some of its bridges, we should be strongly inclined to hold it to be misleading in the particular insisted upon by counsel for plaintiff in error, for the declaration that it was unsafe to pass under certain bridges while

"standing on a car" might reasonably induce the belief that it was not dangerous to pass under the bridges in any other position; but the effect of that paper was considered by this court along with other facts in the record, and it contains by no means the only or most important sources and opportunities for information open to the employees of the company.

It is claimed that the evidence shows that the plaintiff's intestate was killed while applying the brakes in obedience to a signal to that effect given by the engineer, in order to stop the train, and place it on a side track a short distance in advance, so as to leave the main line open for a passenger train due within a few minutes, and that, being required to act upon this sudden emergency, want of ordinary circumspection and care upon his part is to be excused.

In the first place, we do not consider that the circumstances set out in this record prove the existence of an "emergency," in the sense in which that term is sought to be employed. There is nothing in the customary signal to a brakeman to put brakes upon his train which should so disturb his equanimity as to render him irresponsible for his acts.

In the second place, the evidence upon this point now before us is just what it was when the case was formerly heard by this court. The very point was considered, and the evidence as to whether the whistle sounded the signal for brakes or to announce the approach to a station was held to be conflicting, but that upon a demurrer to evidence it was to be considered most favorably to the demurree, and was therefore to be taken as establishing a signal for the application of brakes, but it was not held to constitute an "emergency" which would relieve the decedent from the consequences of his own negligence.

We conclude from the evidence that the bridge was a dangerous one; that its danger was known, or should have been known, to the intestate; that the accident could have been avoided by ordinary care upon his part; and that, in failing to lower his head upon reaching the bridge, he was guilty of such contributory negligence as precludes the recovery of damages by his administrator for his death.

The judgment of the circuit court is affirmed.

CARDWELL and RIELY, JJ., absent.

HUGHES

v.

LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, Nov. 29, 1898.*)

Death of Brakeman—Dangerous Bridge—Liability of Company—Question for Jury.—Deceased, a brakeman, just as the train was about to pass over a bridge, was seen descending by a side ladder from the top of the caboose, where he had been in the discharge of his duties. When next seen, he was lying across the track in the rear of the moving train. No one saw him the instant he fell, but there was evidence forcibly tending to show that he was struck by a girder of the bridge, a fragment of his clothing being found upon it, and the distance between it and the side ladder of the caboose, as it passed, having been only about 17 inches. *Held*, that the case should have gone to the jury.

Same—Same—Same—Assumption of Risk.*—If the accident would not have happened but for the dangerous proximity of the bridge girder to the track, the fact that deceased, at the time of the accident, was chargeable with notice of such proximity, and was not exercising ordinary care for his own safety, would not relieve the company from liability for his death.

Evidence.—Testimony for plaintiff to prove that a brakeman on the train had said, after the train was about a mile and a half from the bridge and the brakeman had returned to the bridge, that deceased had been knocked off the train was inadmissible, such statements not being a part of the *res gestae*, and not offered to contradict the brakeman.

Same.—Testimony as to a mere expression of opinion about the accident by the conductor, who did not state that he saw the accident, was inadmissible as part of the *res gestae*.

APPEAL by plaintiff from Jefferson county circuit court. *Reversed*.

Matt O' Doherty, for appellant.

Lyttleton Cooke, for appellee.

*See Wood *v.* Louisville & N. R. Co. (C. C. Tenn.), 11 Am. & Eng. R. Cas., N. S., 525, and *notes*, p. 531. See also, *note*, 8 *Ibid.* 470; New York, C. & St. L. R. Co. *v.* Ostman (Ind.), 6 *Ibid.* 588; Bryce *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 9 *Ibid.* 832.

Hughes *v.* Louisville & N. R. Co

PAYNTER, J. In September, 1894, the deceased, Ollie T. Hughes, was a brakeman on a freight train going south from Louisville. Immediately after leaving Belmont, and just after daylight, he, as his duties required, left the caboose, and went up on top of it to remove a deck lantern. There were iron ladders on each side of it at the rear end. After getting the lantern, he started to go down the ladder provided for that purpose on the west side of the caboose, and while descending it, it is claimed, he was struck by the girders of the bridge over which the train was passing, and thrown from the caboose to the track, causing injuries which resulted in his death a month thereafter. The court instructed the jury to return a verdict for the defendant; so the question presented is whether the case should have gone to the jury.

Case Stated.

It is claimed that the bridge was not constructed in a way that made it reasonably safe for the deceased to discharge his duties, and that by reason thereof he lost his life. On the other hand, this is denied by the appellee, and it is claimed that, if it was not so constructed, the deceased was presumed to know its condition, and that his contract of employment required him to take the risk; and, further, that the evidence failed to show that the injury was the result of the negligence of the appellee. Testimony was offered by the plaintiff tending to show that the space through which the train passed, between the girders of the bridge, was 12 feet, while one of the witnesses for the defendant testified that the space was slightly less than 12 feet. There was testimony tending to prove that the caboose (from which the deceased fell), including the ladders, was something over 9 feet wide, leaving the space between the ladder and the inner edge of the girder about 17 inches. There is testimony tending to prove that, after the deceased got on top of the caboose and procured the lantern, he started down the ladder, and, when last seen, part of his body was over the side of the caboose, descending the ladder, when a crash was heard as from the breaking of glass, and the conductor looked out of the window, and saw him lying across the track in the rear of the moving train. No one saw him at the instant he fell; hence there is no witness to describe the exact manner of the fall from the caboose, or what caused it. There is testimony tending to prove that a man in the act of descending the ladder, and in that position, while passing through the bridge, would probably be struck

by it. This is the testimony of an experienced brakeman, who is familiar with trains and also the bridge in question. In fact, there is no testimony in the record which tends to show that he was not in a perilous position in going down the ladder while crossing the bridge. The evidence also tends to prove that the intestate's leg was injured; that a narrow strip about four inches long, torn from his trousers, was found on the bridge; and also some lint from his clothes was found adhering to the girder of the bridge.

It is argued that, under the decisions of this court, it was necessary for the plaintiff to have offered testimony showing that the death of the deceased was the result of the negligence of the appellee. This is true. It is also argued by counsel for appellee that there is a failure to show that it was guilty of such negligence as to make it liable for the injury. To support that contention, among other cases are cited Wintuska's Adm'r *v.* Railroad Co. (Ky.) 20 S. W. 819 Nance's Adm'r *v.* Railroad Co. (Ky.) 17 S. W. 570; Hughes *v.* Railroad Co., 91 Ky. 526, 16 S. W. 275. It was held in the Hughes Case that one suing to recover damages for injury arising from another's neglect must offer some testimony showing that the party complaining was injured and also introduce some testimony tending to show the other party is to blame for it, as negligence cannot be presumed. The court held in that case that the evidence did not tend to establish the fact that he had been struck by a loose overhanging timber in one of the tunnels; and that if he was killed in going through another tunnel, he could not recover because brakemen were required to sit or lie down by the brakes, as it was customary for them to do in passing through the tunnels. It was claimed in the Wintuska Case that the deceased was killed in going down the ladder at the side of a box car, with the view of going to a flat car in front of it, and in doing so he came in contact with a ledge of rocks. The court held the company was perhaps guilty of negligence in allowing the rocks to project so near the passing trains, but, unless this caused the accident to the deceased, a recovery could not be had on account of it. The court concluded, from the testimony in that case, that the evidence was not sufficient to authorize the jury to reach the conclusion that he had been killed by coming in contact with that rock. There was no evidence tending to show that there was any lint from the clothes of the deceased on the rock; neither was there a strip torn from his trousers lying

below the rock, nor was there any evidence that he fell from the ladder. Had there been, probably the court would not have held that there was not evidence sufficient to have allowed the jury to pass upon the question as to whether the deceased had been killed by coming in contact with the projecting rock. The deceased, Hughes, seemed to have been in good health. Nothing is made to appear indicating that he might have had an attack of vertigo, a possibility suggested in a speculation as to the cause of the accident. He was seen in the act of descending the steps, and to be in that position, under the circumstances and conditions proven, indicates that reasonable men might conclude that he came in contact with the girder of the bridge, and was thus thrown from his position, inflicting injuries from which he died. At any rate, the jurors should be the judges of the facts and circumstances proven, and they should be allowed to determine from them as to whether or not the negligence of the appellee caused the death of the deceased. In the case of Railroad Co. *v.* Sampson's Adm'r, 97 Ky. 70, 30 S. W. 13, the court said: "The employee assumes the ordinary risks pertaining to an employment that is often and necessarily attended with much danger, but this does not exempt the railroad company from liability when reasonable precaution on its part would save its employees from harm, and in a case like this, where the exercise of the slightest care would have prevented the accident. There can be and has been no reason assigned in this case why a corporation with the means to construct a railway would, in the construction of small or large bridges, leave them in such a condition as involves its employees, brakemen, in imminent peril when passing through them, when, with a small expenditure, such structures in this regard could be made perfectly safe. We are aware of many reported cases, some of which have been referred to by counsel, where the absence of ordinary care and the means of knowing the condition of the bridge by the employee have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures, but, on the contrary, in the case of Derby's Adm'r *v.* Railroad Co., 4 S. W. 303, plainly intimated that, if the intestate in that case had been required to be on top of the car as it passed through the structure in discharge of his duty, and

Death of Brakeman—Dangerous Bridge—Liability of Company—Question for Jury.

Same—Same—Same—Assumption of Risk.

was killed by reason of its being too low for the cars to pass under, the brakeman standing erect upon them, a recovery would have followed." In the case of Derby's Adm'r *v.* Railroad Co., 4 S. W. 303, the court said: "We think the rule is that railroad companies are not bound to furnish appliances absolutely safe, but that they must use reasonable care to provide such as are reasonably adequate and safe for the use of their employees. The latter, in accepting the employment, assume all the ordinary risks of the business; but, if engaged in operating the trains, they cannot well know, and it is not a part of their business to ascertain, the condition of the appliances in use, unless they are immediately under their care and subject to their control. They do not contract with reference to them. Thus a brakeman has a right to rely upon the company using reasonable care in providing a safe track. He has no opportunity to inspect it; it is not a part of his business; and unless he, in fact, knows of its defective condition, and recklessly exposes himself to the danger, he is not chargeable with neglect. The master cannot place an additional or extra risk upon the servant without notice to him." In the case of Bogenschutz *v.* Smith, 84 Ky. 339, 1 S. W. 580, the court said: "Thus, it is, in general, no part of the duty of a brakeman to inspect the track of a railway or to know that it has been safely constructed. The master may have superior means of knowledge, and the circumstances may authorize the servant to rely on him because of want of equal opportunity. The servant may be ignorant without fault, while the master is negligently so."

The court should have submitted the question to the jury as to whether the injury which resulted in the death of the deceased was caused by the negligence of the appellee.

The plaintiff introduced George and J. F. Collins in chief to prove that a brakeman on the train from which Hughes fell said he (Hughes) had been knocked off of the train. These witnesses claim that this statement was made at the bridge, after the train had run about one mile and a half and the brakeman had returned to the bridge. Collins also said that the brakeman notified them at a point a mile from the bridge that a man had fallen off, or had been knocked off, of the train. These statements are not a part of the *res gestæ*, and therefore are inadmissible as evidence. Railroad Co. *v.* Ellis' Adm'r, 97 Ky. 343, 30 S. W. 979. This testimony was not offered to contradict the brakeman, and, if it had been, it was inadmissible, because

Evidence.

the brakeman did not testify that Hughes had not been knocked off by the bridge, and his testimony did not tend to show that he had not been knocked off by the bridge.

The testimony of Morehead that Coffey, the conductor of the train, said, immediately after it had stopped, the bridge "got him," is inadmissible as part of the *res gestæ*, as it was a mere expression of opinion of Coffey, not a statement that he saw him knocked off of the train by the bridge. Coffey testified that he did not see Hughes fall. He did not pretend to have any knowledge as to Hughes' position at the time he did or what caused him to fall.

Same.

HARDY

v.

BOSTON & M. R. R.

(*Supreme Court of New Hampshire, July 31, 1896.*)

Injury to Employee—Bridge Guards—Assumption of Risk.*—Although the evidence was such as to justify the conclusion that deceased had assumed all the other risks incident to the performance of his duties on a train about to pass under a low bridge, he did not assume the risk of being injured through the negligence of the company in constructing a bridge guard (which was extended over the track at a distance of 125 feet from such bridge) about six inches higher above the tracks than the under surface of the bridge timbers, it appearing that though he was chargeable with notice of the location of the bridge guard, he was not chargeable with notice of such difference in elevation; and there having been evidence tending to show that the accident might not have happened had the guard been properly constructed, it was not error to refuse to take the case from the jury.

EXCEPTIONS by defendant from Merrimack county. *Exceptions overruled.*

*See Gusman *et al. v.* Caffery Cent. Refinery & R. Co., Limited, *et al.* (La.), 8 Am. & Eng. R. Cas., N. S., 463 and *notes*, p. 470.

Almon F. Burbank and *George B. French*, for plaintiff.

Joseph W. Fellows, *Edward B. S. Sanborn*, *Frank N. Parsons* and *Oliver E. Branch*, for defendant.

CHASE, J. Assuming the truth of the evidence (Bullard *v.* Railroad Co., 64 N. H. 30, 5 Atl. 838), and construing it most favorably for the plaintiff (Lyman *v.* Railroad Co., 66 N. H. 200, 20 Atl. 976), does it conclusively appear that the injury to the deceased was caused by dangers of which he assumed the risk when he entered the defendant's service? Is the evidence so definite and convincing that fair-minded men might not arrive at opposite conclusions in answering this question? Unless it is, it cannot be said that the jury could not properly find a verdict for the plaintiff, and the denial of the motion for a nonsuit must be sustained. Paine *v.* Railway Co., 58 N. H. 611; Lyman *v.* Railroad Co., 66 N. H. 200, 204, 20 Atl. 976. Among the risks which Hardy assumed by entering into the service were those incident to the performance of his duties in setting cars from a train upon the spur track, of which he was informed, or which ordinary care would have disclosed to him. Fifield *v.* Railroad Co., 42 N. H. 225; Nash *v.* Steel Co., 62 N. H. 406; Henderson *v.* Williams, 66 N. H. 405, 23 Atl. 365; Bancroft *v.* Railroad Co. (Hillsborough, July, 1893; CLARK, J.) 30 Atl. 409. He knew, or by the exercise of such care would have learned, of the following facts affecting the risks of his service at that point: The proximity of the siding to the bridge,—not in feet and inches, but in a general way; the necessity of being upon cars at the bridge when they were moving at a speed of about 15 miles an hour; the insufficiency of the space between the top of a car and the under side of the bridge to allow him to stand erect; the variation in the space by reason of the different heights of cars; the necessity of taking this variation into account in adjusting the position of his body so as to pass safely under the bridge; the liability to obstruction of one's view by the smoke from the locomotive; the location and general character of the bridge guard; the nature of his duties, and the way in which they should be performed. Fair-minded men could not come to different conclusions in respect to these matters; but there were others to be considered. If there had been no bridge guard near the bridge, and the deceased had known, or ought to have known, of this fact, the whole duty of looking out for his safety in passing the bridge would have devolved upon him. The introduction of

a guard transferred a part of this duty to the defendants. There being a guard, the risk assumed by the deceased was not that of passing under such a bridge without any means for reminding him of its proximity, but that of passing under such a bridge protected by a guard such as he knew, or ought to have known, this one was. He had a right to rely upon the guard to remind him of his approach to danger. Its office was to notify him and other trainmen, by the senses of sight and feeling, that they were about to pass a bridge which would hit them unless they changed their position. The necessity for such a reminder arises from the fact that trainmen are liable to become absorbed by the immediate duty before them, and so lose consciousness for the moment of their proximity to danger. To accomplish the object in view the guard should be some device that will hit some portion of the body when the head is above the plane of the under surface of the bridge; not for the purpose of furnishing a guage by which to adjust the position of the body, but for the purpose of calling attention to the proximity of danger in and above that plane. The statute provides that the character and location of guards shall be approved by the board of railroad commissioners. Pub. St. c. 159, § 26. It did not appear that the commissioners had acted on the subject at the time of the deceased's injury. The question of suitableness of the guard in character and location was, therefore, to be determined by the jury. It cannot be said, as a matter of law, that it was suitable. The jury might find that the lower ends of the wires should be as low, at least, as the level of the under surface of the bridge timbers, so that they would give warning whenever any portion of the body was above that level. It is evident that a bridge guard, properly constructed and located, will not always perform its office, and does not wholly remove the risk of injury from overhead obstructions. A man may thoughtlessly go upon a car as he is passing under the guard, or between it and the obstruction, however suitable the location of the guard may be, and receive no warning from it. The risk of doing this is incident to the service. To avoid it, a duty rests upon the man to use his sense of sight when about to go upon a car, to ascertain whether he has passed the guard. Whether Hardy stepped onto the car before or after passing the guard was a question of fact. The evidence bearing upon it is not so positive and convincing as to remove all doubt. The fire-

man thinks he had got on the car before passing the guard; but his testimony seems to be an inference drawn from other facts, instead of positive recollection. Some fair-minded men might agree with him, while others might come to the opposite conclusion. If he got upon the car before passing the guard, he was at liberty to rely upon it to warn him by the sense of touch of his approach to danger, unless the guard was unsuitable in location or character for that purpose, and he knew, or ought to have known, of its unsuitableness. While it may be safely said that he knew, or ought to have known, of its location in reference to the bridge, the evidence does not conclusively show that he knew, or ought to have known, of the difference in elevation between the ends of the wires and the under surface of the bridge timbers. This fact may not have been—probably was not—ascertainable except by actual measurements, or a sighting from one object to the other, under more favorable circumstances than was possible when the person was upon the top of freight cars in motion, attending to other duties. Upon the evidence the jury might find that Hardy mounted the car before reaching the bridge guard, and, supposing its wires depended as low, at least, as the under side of the bridge timbers, relied upon it to warn him if his head got above that level; that, at the moment of passing the guard, his head happened to be below the level, and he did not raise it higher before reaching the bridge; and that, receiving no warning, he understood he was below the danger level. It is no answer to say that the jury might find the other way. Fair-minded men, upon considering and weighing the evidence, might come to different conclusions on this point; but, as has been seen, this does not shift the duty of deciding the question from the jury to the court. These considerations show that the motion for a nonsuit was properly denied. It follows that the defendant's motion, at the close of the evidence, for judgment in its favor, was also properly denied. Exceptions overruled.

PARSONS, J., did not sit. The others concurred.

BLACK

v.

MIDDLE GEORGIA & A. RY. CO.

(*Supreme Court of Georgia, May 26, 1898.*)

Injury to Minor Employee—Questions for Jury.—It was erroneous, on the trial of an action brought by a mother against a railroad company for the homicide of her minor son, a youth of 16 years, to direct a verdict for the defendant, when, under the evidence submitted, the following were disputable questions, *viz* : Whether or not the parents of the deceased consented to his employment by the company in the work in which he was engaged when killed; whether or not the deceased was familiar with the duties incident to his employment, and, if not, whether he was or was not properly instructed and warned as to the dangers attendant upon a performance thereof; whether or not he was free from negligence as to the occurrence by which his death was occasioned; and whether or not the same was caused by the negligence of the company or its employees.

(Syllabus by the Court.)

ERROR by plaintiff from Putnam county superior court. *Reversed.*

W. F. Jenkins & Son, for plaintiff in error.

W. B. Wingfield and *L. A. Dean*, for defendant in error.

LITTLE, J. Mrs. Sarah C. Black instituted in Putnam superior court an action against the Middle Georgia & Atlantic Railway Company to recover damages for the homicide of her minor son, James Black, which she alleged was occasioned by the negligent handling and operation of the defendant's cars. In her petition she alleged that, by the consent of her husband, her minor son, James Black, was on the 19th day of February, 1896, employed by the company, through its track foreman, Frank Newman, to assist in loading a pole

As to when Negligence and Contributory Negligence are for the jury, and when for the court, see Bronson *v.* Oakes *et al.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 166 and *note*; 7 Am. & Eng. Enc. Law (2nd Ed.) 456.

or hand car with rock, and in hauling same from a field near by, to what is known as "Mud Cut," situated on the line of railroad between Eatonton and Willard station. She alleged that the boy was 16 years of age, and that the employment or service above referred to, and in which his father permitted him to engage, was a safe one, accompanied with no unusual hazard or danger, and was such a service as a boy 16 years of age could well and safely render. She alleged that no other contract or agreement was made by the parents of the minor, or by either of them, with the company or its agent, touching his service, and that under the agreement the company had no right to place her minor son at any other kind of labor, or at any other place; that neither of the parents ever consented in any way that their minor son should work elsewhere for the company. She alleged that notwithstanding her son had never had any experience as a train hand prior to the 19th day of February, 1896, and by reason of said fact, and by reason further of his tender years, immature judgment, and undeveloped intellect, he was less able to judge of the danger to which he was exposed by the act of the company hereafter mentioned, the company, without the knowlege or consent of his parents, did on the 22d day of February following, through its general manager, J. W. Preston, who had authority to direct and control its employees, to control its trains and locomotives, and to manage its business generally, assign plaintiff's son to labor as a brakeman on a construction train, consisting of a Mogul engine and several box cars, heavily loaded with cross-ties and bridge timber. She alleged that it was only a few minutes before the injury from which her son died occurred that she or her husband knew that their son had been assigned to duty as a brakeman, and that there was no means or opportunity on their part of terminating such service before the injury occurred; that the labor thus assigned to her son was one of great peril, risk, and danger, requiring skill and expetience in its performance; that, while the construction train was at Willard station, it became necessary to propel the same backward along the main line for the purpose of placing it on a side track, and that, while the construction train was being thus moved backward, Preston was present, and directing its movements, and her minor son was standing upon the top, and within a few feet of the end of the box car nearest the approaching passenger train; and that, while the train was so moving backward towards the switch at the

entrance of the side track, it was checked with such great and unusual suddenness and violence that her son was unable to remain upon the top of the box car, but was thrown therefrom with great violence to the track, ahead of the moving train, and was dragged along the track by the moving car for a distance of about 70 feet, and sustained certain described injuries, from which he died on the morning following. She alleged that the conduct of the company in thus assigning her son to duty, being without the consent of his parents, or either of them, was unauthorized and illegal; that the contract for such service, if any was made between the minor and the company, was null and void, and of no legal effect. She alleged that the company was guilty of gross negligence and want of care, in the following particulars: (1) In assigning the minor to duty as a brakeman on the top of the car,—such service being accompanied with great peril, hazard, and risk,—all of which was without the consent of his parents, or either of them. (2) In assigning the minor to such perilous service, when he had had no experience previously, nor any training in such work, and was therefore less able to judge of the danger surrounding him, and to protect himself therefrom. (3) In checking the train with such great suddenness and violence as to throw or jerk the deceased off of the top of the box car, where he had been placed by the company. (4) In placing the Mogul engine under the care and management of S. W. T. Bozeman, as engineer, who had had no experience in operating a Mogul engine; said engine being very large, of great power, and requiring skill and experience to properly and safely operate it. (5) In not attempting to place the construction train on the side track at an earlier time, when it could have been done with safety and ease, instead of waiting, as was done, until the near approach of the passenger train, which was running rapidly; thereby requiring the movement of the construction train to be more rapid. (6) In assigning the deceased to labor as a brakeman on the top of the box car, which was a perilous service, requiring the full use of all the physical energies and mental faculties, while the deceased was in a run-down and worn-out condition, resulting from labor performed by him for the company almost the entire preceding night, without sleep, rest, or food. She alleged that it was well known to the company that the deceased was a minor, and had no experience in train service of any kind; that he was never married, and therefore left no

wife or child; that he contributed materially to her support, and that she was dependent on him for a support; that her son was of sound mind, well developed, in good health, capable of doing valuable labor, and was rapidly becoming more capable of earning money; that the full value of his life was $6,000; that he was without fault, and did not contribute to his death, etc.

In the answer filed by it, the defendant admitted that James Black, on the day named, and at the place specified in the petition, received certain injuries, from which he died on the following day. It admitted that its general manager, J. W. Preston, had assigned Black to labor as a brakeman on a construction or repair train, but denied that James Black was hired by it for the particular purpose specified in the petition, and alleged that, on the contract, he was hired, with the consent of his father, and with the knowledge and consent of his mother, to do general work on the track or repair gang of defendant, under which contract it was his duty to labor, on or off its repair train, at any work which might have been assigned him by defendant, or its agents or officers in charge. It alleged that his father was himself a railroad man, of long experience and familiarity with railroad work and the duties of railroad employees, and knew that the duties of an employee on the track or repair gang would frequently require such employee to be assigned to labor as brakeman on repair trains. It alleged that it was unable to say whether or not James Black had much or little experience as a train hand, but averred that, before he was assigned to labor as a brakeman or train hand, he was thoroughly examined by defendant's agent as to his knowledge of and familiarity with such duties, and it was ascertained that he was informed thereon. The defendant further denied all other allegations contained in the petition tending to impute negligence to it.

The evidence introduced by the plaintiff tended to show that on the morning of the 19th of February, 1896, Newman, who was an extra foreman on defendant's road, engaged in ballasting the road at "Mud Cut," sent one of his hands to the house of William V. Black, father of the deceased, to employ James Black to help him in loading and carrying rocks on a pole or hand car from a field nearby to the cut. The father never made any contract with any one, nor did he or his wife consent to the working of their son as a brakeman on a construction or freight train. The deceased was 16 years old. His appearance was that of a boy, and not that of a

man, and any one could readily tell that he was a boy of that age by looking at him. Labor as a brakeman on a construction train is as dangerous a place as there is on a train. It would be a great deal more dangerous than work on a pole car. The parents did not know that their son had gone to work at any other place than that to which they had consented he should go until they saw him pass their home, on top of a box car situated in the moving train, on February 22d, the day the injury occurred; and they then had no opportunity of preventing him from further performing such service. The deceased had never had any experience as a train hand, and his parents, in response to a request from him to allow him to work on a train, had declined to grant him permission to do so. He had been rendering valuable service to his mother and other members of the family, amounting to the value of $10 or $15 per month, and his mother was dependent on him for a support. It was also shown by witnesses for the plaintiff who saw the accident at Willard station that the train was backing at the rate of six or eight miles an hour; that the deceased was on top of the rear box car; that, in undertaking to stop the train, the engine was reversed; the coupling links began to jerk and make an unusual noise; the stopping of the train was a pretty sudden jerk,—violent and more sudden and a great deal quicker than usual. Another witness testified that he had seen many cars stop, and that this was the hardest and most violent jerk of any he had ever seen; that the deceased was standing within five or six feet of the end of the car, and he saw him do nothing to cause the fall; and that his fall was caused by the jerk. It was further shown that the deceased was giving signals properly when he was thrown off, and that this was the proper thing for a brakeman to do in the line of his duty. For the defendant, Frank Newman testified that, as track foreman, his duties were to do anything required of him by the railroad officials, from one end of the road to the other; that he went with the construction train, distributing material and supplies for the road, such as cross-ties, loading and unloading wood, filling up bad places, etc.; that the employees hired by him were not hired for any particular job, but were hired to do anything there was to do, and to go with him on the train when necessary; that on the 19th of February he was hauling rock to ballast the track at "Mud Cut," using a hand car for this purpose; that that was the work he wanted the deceased to do (that is, pick up

the rock from the field and put them on the hand car); that the hand car was pushed along the track by hand, moving about 10 miles an hour down grade, and was a safe business, unless the car was wrecked, but, if wrecked, would not hurt a man pushing it. Witness had orders to take the construction or freight train out on the road to distribute ties. And it was shown by J. W. Preston, general manager of the road, that on the day of the accident the deceased came to him, and requested permission to go on top of the box cars, as a brakeman. Preston asked him what he knew about it, to which the latter replied, "All about it." He then asked him if he had experience, to which he replied, "Yes." He was then examined as to the meaning of one, two, and three blasts of the whistle, respectively; and, upon answering these questions satisfactorily, Preston stated to the deceased that he could go up, but enjoined him to be careful. It was shown that the train on the occasion of the injury was backing slowly,—about as fast as a man could walk; that the deceased was transmitting the signals from Preston, who was in charge of the train, to the engineer; that there was a brake on the end of the car upon which deceased stood; that the jerk was not unusual; that the deceased seemed to be familiar with the signals, and witness did not think it necessary to ask him what he knew about the danger of braking on a car, because he gave the witness the impression that he had had experience in that line, and knew all about it. Preston further testified that he had a conversation with the father of the deceased after the accident,—either on the day of the accident or the next,—in which the father said he was sorry his boy had gone to work for the road, but that the deceased was very anxious to go, and he and his mother consented for him to go. From this conversation the witness gathered the impression that the father had allowed the deceased to go, but against his judgment. There was also evidence tending to show that the engineer in charge of the engine was a fit and proper person to handle and operate it, and that the stop was made, not by reversing the engine, but by applying vacuum brakes. It was also in evidence that one standing as near the end of the car as was the deceased ought either to have held onto the brake, or been walking against the motion of the car; it being improbable that even an experienced brakeman could have withstood the jerk attendant upon the stop (which was a usual one, considering the length of the train) without resorting to the one or the other of these

methods. It was also in evidence that the deceased was well developed for his age, and would have been taken by witness, from his size, to have been 21 or 22 years old. At the conclusion of the evidence, the material portions of which are set out above, the court directed a verdict for the defendant, and the plaintiff excepted.

Inasmuch as, under the view we take of the case, a new trial must be had, and in consideration of the fact that at such hearing the pleadings will be subject to amendment, and the introduction of other testimony not appearing in this record, and consequently that the present aspect of the case may be materially changed, we deem it unprofitable at this time to formulate and announce at length the principles and rules of law which control the various issues and questions raised and made in the case. In this action the plaintiff, who is the mother of the deceased, bases her right to recover against the defendant for the homicide of her son on the provisions of section 3828 of the Civil Code, which declares: "A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." It is obvious from the statement of the pleadings and evidence set out above that it was a disputed question of fact whether or not the parents of the deceased minor consented to the employment by the company for the particular work the minor was engaged in doing when injured. It was also a disputed question of fact whether or not the deceased was familiar with the duties incident to his employment, and whether he had sufficient discretion and experience to enable him to understand and appreciate the dangers attendant upon a performance of those duties, and, if not, whether he was or was not properly instructed and warned concerning such dangers.. It was also a disputed question of fact as to whether or not the deceased was free from negligence as to the occurrence by which his death was occasioned, and also whether or not the same was caused by the negligence of the company or its employees. Upon each of these material issues of fact the evidence was more or less conflicting. Section 5331 of the Civil Code provides that "where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find

for the party entitled thereto." Applying this rule of the Code, the action of the court, directing a verdict for the defendant, was erroneous. The cause should have been submitted to a jury to determine the various issues of fact involved, under appropriate instructions from the court touching the rules of law applicable. Judgment reversed.

STOCKWELL

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, May 26, 1898.*)

Injury to Employee—Failure to Inspect—Proximate Cause.*—In an action by a fireman against the railroad company for injuries sustained by plaintiff from heat while oiling the engine by hand, the glass tube of the automatic lubricator, as often happened at such times, having broken, and the valve T being defective, it appeared that the day was excessively hot, and that plaintiff knew that it was his duty when the tube was broken to oil by hand. *Held*, that defendant's failure to inspect the T was not actionable negligence, plaintiff's injuries not being a result of such failure that should have been anticipated, and defendant's failure to inspect, therefore, not being the proximate cause of the injuries.

Same—Assumption of Risk.—Plaintiff had assumed the risk of oiling by hand whether the weather was hot or cool.

Same—Contributory Negligence.—Plaintiff was not guilty of contributory negligence in oiling by hand.

APPEAL by plaintiff from Clinton county district court. *Affirmed.*

Chas. A. Clark and *C. H. George*, for appellant.
Hubbard & Dawley, for appellee.

GIVEN, J. 1. There is no dispute as to the facts, and they are substantially as follows: On and for a long time prior to

*See Ayers *v.* Rochester Ry. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 165 and *note*, p. 168.

July 13, 1892, the plaintiff was employed by the defendant as a locomotive fireman, and on that day, and for some time previous, he was firing engine No. 749, Mr. Yule being the engineer. On the morning of the 13th, they started east from Belle Plaine for Clinton, the engine drawing a train of freight cars. This engine was equipped with an automatic lubricator, attached to the end of the boiler in the cab, so arranged that, when open to the pressure of the steam and water, oil, supplied from an oil cup, was continually forced through a glass tube, and thence through pipe to the cylinders, the passage of the oil being observable through the glass tubes. It was provided with valves by which the oil and the steam and water pressure could be shut off and turned on. It sometimes occurred that from heat or other cause the glass tube would unexpectedly collapse, and in such instances it was necessary to immediately shut off the steam and oil from the lubricator, until another glass tube, a supply of which was carried on the engine, could be put in place. As the train was leaving Belle Plaine that morning, the tube in the lubricator on the left-hand side of the engine broke, whereupon plaintiff immediately closed the valves, so as to prevent a flow of steam and hot oil into the cab, and for the purpose of putting in another tube. The T, or handle, to these valves, being very hot, it was necessary to quickly give them a turn, let go, grab, and turn again, and so on until the valve was closed. In thus closing one of these valves, the stem broke off, so that the valve could not be opened; and therefore a new tube could not be inserted, thus rendering it necessary, in oiling the engine, that oil should be poured into the cup by hand, at frequent intervals. This could only be done when the engine was in motion, and not working steam, and was usually done after steam had been shut off, in coming into stations. It was the duty of the plaintiff, when the lubricators were not operating, to put oil into the cup. To do this, he had to get up over the end of the boiler, with his head near the top of the cab, and remain there for several minutes, gradually putting oil into the cup. This duty plaintiff had performed eight or nine times after leaving Belle Plaine before reaching Stanwood, and had put oil into the cup on coming into Stanwood. The day was very hot, and the position which plaintiff had to take in putting oil into the cup exposed him to a great heat from the boiler. After oiling on approaching Stanwood,

Case Stated.

the plaintiff, though a strong man, was overcome by the heat to which he had been exposed, and, there can be no doubt, was seriously injured thereby. At the time the T or handle to the valve broke off, it fell to the floor of the cab, and plaintiff testifies: "I got down, and picked it up, and looked at it, and it was half broken off. I could tell that by the grease, the corroding on it; it was two-thirds broken off. That was the rod itself, right under the T. I thought no more of it, but just threw it out of the cab." He further testified: "I had never observed or known before that it was broken or weak, only it was the least little bit bent, but almost everything in the cab was bent some. The T was what was bent a little bit. If an inspection had been made, it could have been determined by examination whether it was defective or not; if a man had closed it off, for it broke off with my turning it with my fingers. It could have been tested by tapping it with a hammer. It would not have taken but a very light tap. Or it could have been tested by closing it or opening it."

2. Counsel have discussed this case with much elaboration and many citations of authorities, but, as we view it, it involves only the application of a few well-established and undisputed principles of law. The charge is that the defendant negligently and carelessly failed to inspect said apparatus and keep the same in repair, in consequence of which negligence plaintiff was injured without fault on his part. Defendant's motion for a verdict was upon the grounds that there is not sufficient evidence to support the charge of negligence, nor a finding that the negligence charged was the proximate cause of the injuries complained of; also upon the grounds that plaintiff knew of and voluntarily assumed the dangers, that he was guilty of contributory negligence, that the injuries were not the natural and probable result of the negligence charged, nor such as could have been reasonably foreseen, and that the evidence is not sufficient to sustain a verdict for the plaintiff. The learned district judge held that the plaintiff, having accepted the employment knowing that he might be required to use the cups, and oil the engine through them, assumed the risk of so doing, and therefore sustained the motion for a verdict. The principles of law applicable to this case are laid down in Brann *v.* Railroad Co., 53 Iowa, 596, 6 N. W. 5, are fully sustained by the cases cited therein, have ever since been followed, and

Injury to Employee—Failure to Inspect—Proximate Cause.

are undisputed in this case. Under the law as there announced, this defendant was bound to use ordinary care in selecting this lubricator, so as not to subject its employees to unreasonable danger, but no complaint is made of the selection. As such appliances may in time become out of repair, defendant was also bound to exercise ordinary care in inspecting and repairing the appliance, so as to keep it fit to be used. "What is such care must be measured by the character of the business and risk attending its prosecution." "Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear after the accident would have avoided it. It is only required to have used such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident." McKee *v.* Railway Co., 83 Iowa, 622, 50 N. W. 209. The only consequences that could reasonably have been anticipated to follow a break of the valve stem were these: That if broken when the valve was open, and so that it could not be closed, steam and oil would be injected into the cab until the steam was shut off from the engine; and, if broken, as it was, when the valve was closed and out on the road, the oiling would have to be done by hand, through the cups. Surely, the most prudent person would not have anticipated that the occasional occurrence of the break of the glass tube and the breaking of the valve stem would have occurred at a time when the combined heat of the day and that from the boiler would have rendered oiling by hand dangerous. Where only such consequences as we have named were to be expected, ordinary care did not require the same diligence in inspecting as where defects were more liable to occur, and where actual danger might reasonably be expected. This lubricator was under the constant observation of the plaintiff, and, in part at least, under his care, and he could have discovered the defect in the valve stem as readily as any other person. Though it be conceded that he was not charged with the duties of inspecting the lubricator, yet certainly the defendant had a right to assume that he would report any defects therein observed by him, and that, none being reported, he had not seen any. We think it cannot be said that, as to the plaintiff,

the defendant was negligent in not discovering and repairing the stem of this valve.

3. It is also laid down as the law in the case of Brann *v.* Railroad Co., *supra*, that, in accepting employment as a fireman, the plaintiff assumed the ordinary risks incident to that employment. The lubricator was so constructed as that, in the event of its failing to operate as intended, the oiling of the engine could be done by hand, through the cups. Plaintiff concedes that when, from any cause, the lubricator failed to operate, it was his duty to do the oiling by hand, just as he did it on the 13th day of July, 1892, and therefore, under the rule, he assumed all the ordinary risks of oiling in that manner. The injury is said to have resulted from the excessive heat to which the plaintiff was exposed. But exposure to the heat was one of the ordinary risks of the employment. He assumed the duty of oiling by hand whenever occasion required it, whether the day was hot or cool.

Same—Assumption of Risk.

4. It being plaintiff's duty to oil by hand, and he having done so in the proper manner, he was not guilty of any negligence contributing to his injury in doing the oiling. We have seen, however, that he knew that the T of the valve had been bent for some time, and that he did not report that fact, nor examine it to see whether or not the stem was broken. Whether this failure on his part was such negligence as to defeat recovery we need not determine, as, for the reasons already stated, the court correctly sustained defendant's motion for a verdict. Affirmed.

Same—Contributory Negligence.

MOORE

v.

KANSAS CITY, FT. S. & M. RY. CO.

(*Supreme Court of Missouri, Dec. 8, 1898.*)

Injury to Switchman—Coupling Cars—Dangerous Appliance—Choosing Dangerous Method.*—In an action for injuries received in coupling cars, alleged to have resulted from the negligence of the railroad company in failing to provide crooked links, it was

*See note at end of case.

held that the following principle was applicable: Where a railroad employee knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence, and cannot recover; and that a verdict was properly directed for defendant.

APPEAL by plaintiff from Greene county circuit court. *Affirmed.*

Plaintiff sues for damages on account of a personal injury received while in defendant's employ as a switchman. The facts upon which he predicates the liability of the railway company are these: It was plaintiff's duty under his employment to couple together the cars in making up freight trains in its yards at Springfield. He was engaged in so doing on the 12th of January, 1895, when it became necessary for him to make a coupling between two cars, the drawheads of which were of unequal height. Defendant failed to furnish crooked links for that purpose, and plaintiff was compelled to use a straight link. This was the only kind provided. The failure to supply crooked links for use upon such occasions is the negligence counted upon in the petition. It is claimed that a straight link is unsuitable, and not reasonably safe for a switchman to use, when the drawheads are not of the same height. At the time plaintiff was hurt, 11 or 12 cars had been placed in the train, and were standing upon the main track. Another car was brought up, and placed in such position that it would run downgrade to the stationary cars above mentioned, to which it was to be attached. It was then cut loose from the engine and ran down to the other cars. The drawhead of the moving car was lower than that of the one standing still. The link was in the lower drawhead, and, as the cars came together the first time, plaintiff tried to make the coupling by raising the link so that it would connect with the higher drawhead of the other car. He failed in this attempt, and says that, when the moving car struck those standing on the track, it "bounced back," but he could not tell how far. He afterwards changed the link to the higher drawhead. The other car was then hit by one set in by the engine on the same track, and began again to move towards those composing the train. Plaintiff, as they came together the second time, made another effort to effect the coupling. He attempted with his right hand to force the link down to the lower drawhead, but failed, and his hand was caught and badly

mashed, and amputation of several of his fingers became necessary. The evidence showed that plaintiff was 32 years old, and was an experienced switchman. He had been railroading for a number of years, and had been in defendant's employ probably 10 years or more. It further appeared that defendant had never furnished its employees with crooked links to make such couplings. Plaintiff testified that he could have raised the lower drawhead, and propped it up, and in that way have made the coupling without placing his hand in the dangerous position where it was hurt, if he had had time to do so between the movements of the car. He says he did not do this for want of time; that, as the cars were coming together, it would have been more dangerous for him to have gone between them to raise the lower drawhead than to do as he did. The evidence does not disclose any reason why he might not have waited until he could make the coupling in a proper and safe way. The testimony does not show that he was required to make it when the cars came together the second time. J. M. Daly, a witness for plaintiff, testified on cross-examination as follows: "Q. I understand you to say that a proper way to make a coupling of cars having drawheads of different heights is to put the link in the higher drawhead, and to prop up the lower drawhead with anything the switchman may be able to pick up around the yard as a chip, cinder, stone, or anything? A. Yes, sir; very often use a link or a pin. * * * Q. Is it not common among experienced switchmen, and considered reasonably safe by them, where they come to couple cars having drawheads of unequal height, to simply prop up the drawhead in the way you have before indicated, and there insert the common straight link in the higher drawhead, and allow the cars to come together in that way? A. Yes, sir; it is common where the engine has hold of the cars, and stops the cars, and there is time. Q. Suppose that the engine has not hold of the cars, but that it has been kicked back for the purpose of being coupled to a car having a low drawhead, and this is discovered by the switchman, and he declines to try to effect the coupling when the cars first come together, but waits for the rebound, will not an experienced brakeman in such case go along, and prop up the lower drawhead, and wait for the next movement of the car to make the coupling? A. Yes, if he has room to do it. Q. And, in such case such a coupling would be easily effected in that way, would it not, with a straight link? A. Yes, sir;

if you can raise the drawhead high enough. Q. Is it not true the coupling of cars having drawheads of unequal heights are generally made by switchmen with straight links by simply propping up the lower drawheads in the way you have indicated? A. Yes, sir." The plaintiff's petition is based upon defendant's negligence in failing to furnish him a crooked link with which to make this coupling, and thereby forcing him to use a straight one in so doing. Judgment is asked for $5,000 damages. The answer, in addition to a denial of the allegations of the petition, contains a plea of contributory negligence, which was put in issue by the replication. Plaintiff introduced testimony tending to show the facts hereinbefore set out, and, at the conclusion of his evidence, the court sustained a demurrer. From a judgment in favor of the defendant, plaintiff has appealed to this court.

Wm. O. Mead and *T. T. Loy*, for appellant.
Wallace Pratt and *Cravens & Cravens*, for respondent.

WILLIAMS, J. (after stating the facts). The question presented for our determination is whether the evidence introduced by plaintiff himself made out such a case as entitled him to go to the jury. If it be conceded that the defendant was guilty of negligence in failing to provide crooked links to be used by switchmen in coupling cars, where the drawheads were not of the same height, the issue of plaintiff's contributory negligence then becomes material. If it clearly appeared from the testimony of the witnesses introduced by plaintiff in his own behalf that he was guilty of negligence directly contributing to his injury, he had no case for the jury, and the court properly directed a verdict for defendant. BLACK, J., said in Weber *v.* Railway, 100 Mo. 194, 12 S. W. 804, and 13 S. W. 587: "Ordinarily, as has been said by this court on several occasions, contributory negligence is a question of fact for the jury; but the power and duty of the court to direct a verdict in proper cases cannot be questioned. As has been said, if it appears without any conflict of evidence from the plaintiff's own case, or from the cross-examination of his witnesses that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury." Buesching *v.* Gaslight Co., 73 Mo. 219; Yancey *v.* Railway Co., 93 Mo. 433, 6 S. W. 272.

Plaintiff in this case was an experienced switchman. He

was 32 years old, and had been railroading a dozen years or more. Coupling freight cars, whose drawheads were of different heights, had been of almost daily occurrence in defendant's yards, so his witness says. Defendant had never at any time furnished crooked links for that purpose, and of this plaintiff was well aware. The evidence clearly shows that it was the practice of defendant's switchmen,when a coupling of this kind was to be made, to use a straight link, which was placed in the higher drawhead, and the lower was propped up, and the connection thus made. It was further shown that this had not only been the uniform practice, but that it was proper and reasonably safe to do it in that way. The only excuse offered by plaintiff for taking another course is that there was not time to prop the lower drawhead after the rebound of the car,and before it was "kicked" a second time against the other cars. He says that it would have been more dangerous for him to have gone between the cars for the purpose of propping the drawhead, in the short space of time intervening, than to do as he did. But he need not have done either. There was no emergency requiring him to risk his life or limbs in making the coupling at that time. He was not commanded to do so. It does not appear that any harm would have resulted from a failure to make the coupling the second time the cars came together. It would have caused a little more trouble to the plaintiff, and possibly other employees, but that is all. He could have waited until the second rebound, then arranged the drawhead in the usual manner, and made the coupling at the next movement of the cars; and his witness says, in substance, that this is what an experienced brakeman would ordinarily have done. Plaintiff was fully aware of all the circumstances, and of the dangers to be encountered. Instead of acting in a way that would have insured perfect safety, he pursued a plan that was likely to, and did, result in the injury which he sustained.

The case, in some of its features, is similar to Hulett *v.* Railroad Co., 67 Mo. 239. NAPTON, J., said: "Now, the testimony of the plaintiff himself was that he was perfectly aware of the fact that the two cars were of different heights; that the difference was obvious to the eye of any one; and that, being aware of this difference, he pushed up the drawhead of the flat car, and turned down the link on the baggage car, but the inequality in height of the two cars proved to be greater than he supposed. He admits that he could

have ascertained the exact difference by stopping the engine, or by closer examination before he ordered the engine to move, and obviously, as other witnesses stated, he could have avoided all risk by making the coupling from the platform of the baggage car. He thoughtlessly ventured to stand on the ground and attempt the connection with a straight link, which he ordinarily did not use in coupling cars of unequal height." The court held that the demurrer to the evidence in the case should have been sustained. In 1 Bailey, Pers. Inj. § 1121, it is said: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where an employee of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." Again, in section 1123: "Where a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter, and is injured, he is guilty of contributory negligence, and cannot recover."

The testimony plainly shows in this case that plaintiff need not have taken the risks which he did. If he had followed the usual practice of switchmen, and with which he was perfectly conversant, he could have made the coupling without injury to himself. It is no answer to say that he could not prop the drawhead before the car came back the second time. He was not compelled to do so at that time. It was not essential that the coupling should be made at that moment. He could easily have awaited another movement of the car, and, as his safety depended upon it, should certainly have done so. He should have made the coupling in the usual way, and no necessity existed for doing it in a different and more dangerous manner. He voluntarily placed himself in a dangerous position, without any necessity for so doing. We agree with the trial court that plaintiff failed to make out a case, and its judgment must be affirmed. All concur.

NOTE.

Master and Servant—Choosing More Hazardous Way of Performing Duty.—If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is

bound to select the latter, and is guilty of such negligence as will bar an action for damages, if he selects the former and is thereby injured; and if the danger is so imminent and apparent, in either way, that a careful and prudent man would not incur the risk, he cannot recover, unless the evidence shows that the injury was caused by the reckless, wanton, or wilful negligence of the defendant's employees. Mobile & O. R. Co. *v.* George, 94 Ala. 199, 10 So. Rep. 145; Louisville & N. R. Co. *v.* Orr, 91 Ala. 548, 8 So. Rep. 360; Memphis & C. R. Co. *v.* Graham, 53 Am. & Eng. R. Cas. 396, 94 Ala. 545, 10 So, Rep. 283; St. Louis B. & I. Co. *v.* Brennan, 20 Ill. App. 555; Pennsylvania Co. *v.* O'Shaughnessy, 41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675; Union Pac. R. Co. *v.* Estes, 37 Kan. 715, 16 Pac. Rep. 131; Dandie *v.* Southern Pac. R. Co., 42 La. Ann. 686, 7 So. Rep. 792. See also Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. Rep. 176; Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639. 655, 21 Pac. Rep. 574; Schaub *v.* Hannibal & St. J. R. Co., 106 Mo. 74, 16 S. W. Rep. 924; Kehler *v.* Schwenk, 144 Pa. St. 348, 22 Atl. Rep. 910; Gowen *v.* Harley, 56 Fed. Rep. 973; Kinney *v.* Corbin, 132 Pa. St. 341, 19 Atl. Rep. 141.

MUNCH

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, Dec. 21, 1898.*)

Injury to Brakeman Coupling Cars—Contributory Negligence—Negligence—Inspection—Questions for Jury.*—*Held*, in an action to recover damages for personal injuries sustained by plaintiff, a brakeman in defendant's employ, while coupling cars equipped with what is known as the "standard coupler," that, on the evidence, the question of plaintiff's contributory negligence was for the jury; and that the question of actionable negligence on the part of defendant, in respect to the care and inspection of the coupler by which plaintiff was injured, was also for the jury.

(Syllabus by the Court.)

*As to Coupling Cars, see generally 7 Am. & Eng. Enc. Law (2nd Ed.) 1046.

Munch *v.* Great Northern Ry. Co

APPEAL by defendant from Polk county district court. *Affirmed.*

C. Wellington and *A. C. Wilkinson*, for appellant.

H. Steenerson, for respondent.

COLLINS, J. Plaintiff had a verdict in a personal injury action, and defendant appeals from an order denying its motion for a new trial. Its main contentions are that there was no actionable negligence shown at the trial on its part, and that from the evidence it conclusively appeared that plaintiff was guilty of contributory negligence, and for that reason should not have recovered. Plaintiff was in defendant's employ as a brakeman, and had been so employed for abou two years prior to the day of the accident. He was then engaged in coupling freight cars in defendant's yard at Crookston. A box car had remained in the yard about 20 days, and was then put at the end of a string of cars, to be coupled onto another car standing on the main track. It was shown that both of these cars belonged to defendant, but there was some dispute as to whether the one last mentioned was a box or a flat. Both cars were equipped with what is known as the "improved standard coupler," an article somewhat difficult to describe, but which is supposed to couple cars automatically, and without requiring a person to stand between them as they come together. On each coupler is a fixed jaw, and also a movable "hooking jaw," and it is defendant's claim that on a straight track, as was the one where the accident happened, and with cars of the same make as were those in question, the coupling can always be made with but one of these movable jaws open. The plaintiff admits that, under such circumstances, the coupling will usually be made, but that to do the work properly, and to make a "sure" coupling, the movable jaws of both couplers must be open, and, further, that this is the usual and customary way of doing this kind of work. A lever runs horizontally along the end of the car from near the outside, to a point a few inches above the coupler, and is there connected, by means of a small chain, hanging perpendicularly, with what is called the lifting pin in the coupler itself. Standing outside the car, the brake or switch man can operate the lever, and pull the pin up a few inches, so that the movable jaw will swing a short distance to one side. If the pin and other parts of the coupler are in

good condition, the pin cannot be pulled entirely out of its socket, but is stopped by a spring and held fast at a certain point. If two cars are coupled, when the pin is thus raised the movable jaw of the coupler thus operated on is pulled to one side by the closed jaws of the other coupler, and the cars uncouple and separate. The jaw thus pulled to one side, weighing over 50 pounds, then remains open, unless closed by hand, or by impact, when brought in contact with another coupler. When the coupler is closed, the raised pin drops to its place and remains there. It stands admitted that, if two couplers are brought together on a curved track, or if they are badly worn, or if the cars are of different makes, they are not sure to work, unless the movable jaws of both are open; for one has to slip past the other, with very little room for variation. The plaintiff was an experienced man, and knew the manner in which these couplers do their work. He also knew that the coupler on the stationary car was open, and the movable jaw in proper position for locking with its counterpart on the moving car. The latter, one of a string before mentioned, was moving slowly, and plaintiff was walking beside it as the stationary car was approached. When within a few feet of the latter, plaintiff pulled the lever of the moving car, and stepped in front of it, between the rails, for the purpose, as he claimed, of opening the movable jaw, that a "sure" coupling might be made. He seized the jaw with his right hand, pulled it with considerable energy, and it immediately swung out of place, too far towards him, and would have fallen to the ground if plaintiff had not used all of his strength in pushing it back. It swung too far, because the pin had been broken in such a way that nothing prevented its slipping entirely out of the socket when raised by the lever, and thus permitting the movable jaw from becoming wholly detached from other parts of the coupler. And before plaintiff could remove his hand and arm, and before he could extricate himself from a dangerous position between the cars, they came together, and his hand and arm were caught in the couplers, and badly crushed, amputation of the arm being necessary. It was shown that the coupling was made, and that another brakeman, who happened to be near by, pulled the lever upon the stationary car, gave the go-ahead signal to the engineer, and thus released plaintiff from a grip

which the couplers had upon the injured arm. As before stated, it is defendant's contention that from the verbal evidence given upon the trial, and from two couplers of the same size and make, which were brought before the jury, it conclusively appeared that, with the movable jaw of the coupler of the stationary car fully opened and ready for business, of which he knew, it was wholly unnecessary for plaintiff to open the jaw of the coupler of the moving car, or to go in front of it, for any purpose whatsoever. If it did so appear, from any evidence introduced upon the trial, it must be conceded that plaintiff had no cause of action. No rule of the company was shown which regulated, or attempted so to do, the manner in which couplings with the standard coupler should be made, the only rule introduced by defendant being one which required that "great care should be used in coupling and uncoupling cars; extra care is required when coupling freight cars."

This brings us to a consideration of the evidence upon the vital point above mentioned. According to plaintiff's testimony, he attempted to make the coupling in the ordinary manner, and exactly as he and other employees of defendant company usually made couplings with the standard coupler. He also testified that he stepped between the rails, and in front of the moving car, when it was five or six feet from the other; and that when he discovered that the pin was broken, and the jaw was sliding out of place, he pushed it back to prevent its falling upon his feet, or in such a way that he would be tripped and thrown under the wheels. When questioned as to the necessity of opening the jaw of the coupler on the moving car, with its counterpart on the stationary car open, he stated that such opening was necessary in order to make a "sure" coupling, although he admitted that sometimes couplings were made with but one jaw opened. A witness for defendant, the conductor in charge at the time of the accident, then testified that on a straight track couplings could always be made with only one jaw of the standard coupler open, the cars being of the same size; and that it might sometimes be that couplings could not be made with the jaws open on both couplers, in which cases links and pins would have to be used. And, further, that couplings are surer to be made with both movable jaws open, and that "we often open both; often where one is open we open the other," in order to make sure of the coupling. It also ap-

peared from the conductor's testimony that occasionally the springs of a car would become worn, and settled down, so that the couplings would not be of the same distance from the ground, thus rendering it much more difficult to couple with but one open jaw. Another witness, a locomotive "foreman" in defendant's employ, testified on this branch of the case, giving it as his opinion that it was not necessary to open both jaws when the cars were upon a straight track. He was also examined as to the couplers brought into court, as before stated, and said that there was usually two or three inches side play or side motion with these couplers, and that they were likely to be loose, and to move sideways, to this extent, one way or the other.

So far as shown by the settled case, this was all of the evidence introduced by either party as to the necessity of stepping in front of the moving car, and, by hand, opening the coupler thereon as it approached that upon the stationary car, or as to the ordinary and usual manner in which such couplings were made. Upon this evidence, the question of plaintiff's negligence, when attempting to make the coupling in the manner shown, was for the jury. From the testimony it seems clear that defendant might naturally and reasonably anticipate or expect that, for the purpose of properly discharging their duties, switch or brakemen might open both couplers instead of depending upon one. Again, as before stated, two of these couplers were exhibited in the court room to the jury, and were operated for their benefit. The foreman testified that there was usually two or three inches of side play or motion to these couplers. While we have no means of knowing, it is possible that these experiments demonstrated to the jury that the side motion rendered the opening of both jaws, for one must slide past the other in order to lock, quite necessary, and had therefore become the usual and ordinary manner of doing the work. Defendant's counsel also contends that plaintiff was conclusively shown to be guilty of contributory negligence when going between the cars, for the reason that, if it was customary and necessary to have both jaws open, the one in the moving car could easily have been put in position, long before it came within five or six feet of the stationary car, allowing the plaintiff to perform his work in comparative safety. There might be cases where the court could say that a brakeman was reckless and extremely negligent in exposing himself to danger

while coupling cars, depending upon the distance between cars to be coupled, the character of the ground between the rails, and the rapidity with which one or both of the cars were moving; but we cannot hold, where the intervening space is five feet at least, the ground level and unobstructed, as it was in this particular instance, and the moving car is going no faster than a man ordinarily walks, that there has been contributory negligence on the part of an employee which will prevent a recovery of damages in case he is injured. One thing more should be mentioned in this connection. It is urged by counsel that plaintiff should not be allowed to recover because he was not justified in attempting to push the jaw back to its place, which attempt probably led to the injury; that he could have readily escaped the impending danger by letting go, and stepping out from between the cars. A man placed in a perilous position, as this was, cannot be expected to act with the deliberation of one who is not in peril. He must act instantly, and plaintiff was not required to stop and consider whether his chances to escape injury were greater if he let go of the jaw than they would be if he should hold on. Defendant's counsel further contends that there was no actionable negligence shown on the part of defendant corporation. The car in question had been in the yard at Crookston for about 20 days, as heretofore stated, when the plaintiff was injured, and from the testimony it appeared that a car repairer was kept at work in this yard. From the appearance of the pin immediately after the accident, it had been broken some time, and it is ably argued that, as defendant's duty to inspect the coupling would be complied with when it exercised such reasonable care in that regard as would be demanded of a person of ordinary care and prudence under like circumstances, it cannot be held liable for want of inspection in this case, because it did not appear from the evidence that such a break could reasonably be anticipated, or that danger to an employee could reasonably be apprehended, if there was such a break. Under the evidence here, it was a question of fact for the jury to pass upon whether defendant had or had not exercised reasonable care in respect to car inspection in this particular case. It might reasonably anticipate that the pins, or other parts of this cast-iron coupler, might become broken, especially where they lock by contact, more or less severe. It might also anticipate that, if a pin was broken, it would be because of its construction, at the point where this

break actually occurred; and it might also anticipate that, when a pin broke at this particular place, there was imminent danger to any employee whose business it was to seize hold of and attempt to open a jaw of the size and weight of that in question. It is true that the break was to some extent concealed while the pin rested in its socket, but as it extended, when in place and good condition, clear through the coupler, and protruded some inches beneath, a glance at that point would have indicated to the car inspector, or repairer, that a part of the pin was missing. This would have clearly shown that it had been broken and was in an unsafe condition. It would have suggested that operating the lever and lifting what remained of the pin was unsafe and dangerous to any person engaged in opening the jaw with one hand while he operated the lever with the other. And again, the broken condition of the pin would have been discovered by the car inspector or repairer if he had merely operated the lever, for it would then have been lifted out of the coupler, as it was when plaintiff undertook to make the coupling. In view of the circumstances shown upon the trial, that this break was not new, but was an old one, that the car had been in the yard for over 20 days, and that the condition of the pin was easily discoverable, we cannot declare, as a matter of law, that there was no actionable negligence on defendant's part in the matter of inspection. It was the duty of defendant company to provide safe and suitable appliances and instrumentalities for its employees to work with, and to exercise reasonable diligence to keep these appliances and instrumentalities in proper repair. This necessarily involves examination and inspection as incident to the obligation to repair, and, in the discharge of this duty, the corporation must of necessity act through servants or agents, for whose negligence as to these matters it is held responsible (Tierney *v.* Railway Co., 33 Minn. 311, 23 N. W. 229); and this is especially true when these appliances and instrumentalities are in constant and severe use, and liable to get out of repair (Moon *v.* Railroad Co., 46 Minn. 106, 48 N. W. 679). The question of defendant's negligence, on the facts before us, was peculiarly one for the jury. The order appealed from is affirmed.

WABASH R. CO.

v.

RAY.

(*Supreme Court of Indiana, Nov. 15, 1898.*)

Special Verdicts.—Where the party moving for a judgment upon a special verdict is not the party upon whom the burden of the issue rests, he may be entitled to the judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish.

Same.—Mere conclusions, surmises, and evidence, set out in a special verdict, should not be considered.

Injury to Brakeman—Unblocked Rail—Assumption of Risk.*—Where a brakeman has passed over a portion of defendant's road, on its trains, every day, except on Sundays, for over a month, and all the spaces between switches and guard rails on such portion of the road are blocked, except at street crossings, and there are more than 50 of such open spaces, and this was the condition of the road when he became defendant's brakeman, he assumes the extra risk pertaining to an attempt to couple cars at one of such crossings.

APPEAL by defendant from Whitley county circuit court. *Reversed.*

A. A. Adams and *Stuart Bros. & Hammond*, for appellant.

Ninde & Ninde, for appellee.

JORDAN, J. The appellant railroad company owned and operated, as one of its branches, a railroad extending from the city of Detroit, Mich., through Columbia City, Ind., to the city of Peru, in the latter state. Appellee is the administratrix of William O. Ray, deceased, who was at and prior to his death in the employ of appellant, as a brakeman on one of its local freight trains. He was accidentally killed while coupling cars at Columbia City, by catching his foot in an unblocked guard rail, and, while in such condition, was run over by the car which he

Case Stated.

*See note at end of case.

was attempting to couple. To recover for this alleged negligent killing, the appellee successfully prosecuted this action in the lower court, and, upon a special verdict by the jury, obtained a judgment for $5,000. The alleged errors of which appellant complains, in the main, are based upon the decision of the court in overruling a demurrer to the amended complaint, and in denying its motion for a judgment upon the special verdict of the jury, and in overruling its motion for a new trial.

We may, at least for the present, pass the consideration of the sufficiency of the complaint, for the reason that substantially the same facts and the same theory thereunder are disclosed by the special verdict; and if we can hold that, under the facts therein found, appellee is entitled to a judgment, such holding will certainly result in sustaining the complaint. Counsel for appellant earnestly insist that their motion for a judgment in favor of appellant, upon the special verdict, ought to have been sustained. Preliminary to the consideration of this insistence, we may properly refer to some familiar and well-settled rules applicable to a special verdict, one of which is that it is the very essence of such a verdict that it state all the material facts within the issues of the case, and no omission of a fact therein can be supplied by intendment. Its failure to find a fact in favor of the party upon whom the burden of establishing it rests is the equivalent of an express finding against him as to such fact. When the party having the onus in a case asks a judgment upon a special verdict, the material facts therein found within the issues must establish his right under the law to a judgment, otherwise he must fail in his demand; but where, as in this case, the moving party is not the one upon whom the burden of the issue rests, his right to be awarded a judgment does not depend alone upon the presence of material facts, but he may be entitled to the judgment by reason of the absence of some essential fact which it was incumbent upon his adversary to establish. The jury, therefore, being required in their special verdict to find facts, mere conclusions, surmises, and evidence have no legitimate place therein, and are entitled to no consideration by the court. Cook *v.* McNaughton, 128 Ind. 410, 24 N. E. 361, and 28 N. E. 74; Railroad Co. *v.* Miller, 149 Ind. 490, 49 N. E. 445.

Special Verdicts.

Same.

It may be said that the verdict in this case is open to the objection that the jury in several instances stated their own

conclusions and conjectures. Eliminating these, however, as we must, the material facts embraced therein, and necessary to the solution of the question presented by counsel, may be summed up and stated as follows: Appellee's decedent was, at the time of his death, a skillful railroad brakeman, 30 years old, sound in body and in good health. At the time of the fatal accident, he was in the employ of the appellant as a brakeman, on one of its local freight trains, which ran over its road between the town of Butler and the city of Peru. His said employment as brakeman by appellant began on February 9, 1893, and he continued to serve as such brakeman on the train above mentioned until the time of his death, on March 14, 1893. During that period he ran on said train each day, except Sunday, over the road, as follows: One day he would run from the town of Butler, through Columbia City, to Peru, and the next day he would return with his train over the same route from Peru to Butler. The defendant, for more than two months prior to March 14, 1893, maintained a certain spur switch and side track in Columbia City, which switch branched off from the main track of the railroad about 50 feet east of the point where said track crossed Main street in Columbia City. This switch extended westward from its junction with the main track for a distance of 400 feet. The south rail of this switch was about 7 feet and 9 inches north of the north rail of the main track where it crossed Main street, and the main track of the switch crossed this street nearly at a right angle. Main street, in Columbia City, including its sidewalks, is 80 feet wide, and the east line of this street is 50 feet west of the junction of the main track of the railroad. Two months and more prior to the death of the deceased, appellant placed and maintained two guard rails for a distance of 45 feet across said street. The east and west ends of these guard rails were about the same distance from the east and west boundaries of this street. One of these guard rails was placed and maintained 2⅜ inches from the north rail of the switch, and the other, the same distance from the south rail; and these guard rails were so placed between the rails of the switch that each was bent and flared out from the main rails of the track until the ends thereof were about 14 inches from the main rail of the switch. The opening of the east end of the south guard rail is described in the special verdict as follows: "That the east end of said south guard rail commenced to separate from the south rail of said track about

nine feet from the end thereof, and continued to curve away from the south rail of said track till the east end thereof was seventeen inches from said south rail, as aforesaid; that said curve in said guard rail made a wedge-shaped space between south rail of said switch and the bent portion of said guard rail, which, at the point where said guard rail commenced to recede from said south rail,was two and three-eighths inches wide, and which space continued to widen as said guard rail continued to leave the main rail, until it was seventeen inches wide at the end of said guard rail." The wedge-shaped space between these rails was unblocked, and the verdict states that for this reason it was "extrahazardous" for the decedent and other employees of the defendant to couple and uncouple cars moving westward over this open space, for the reason that they were liable, when so engaged, to step into said opening, and thereby to cause one of their feet to become wedged and fastened therein, so that it could not be withdrawn until such employee would be run over and killed by the car which he was coupling. The verdict states: That this space or opening could have been prevented by blocking it as follows: "By a wooden block about sixteen inches long and two inches thick, cut in a wedge shape, so that the point would be two inches wide, and then widen as fast as said rail spread." That such blocking would have prevented a brakeman's foot from passing under the rails, and becoming fastened. It is further stated in the verdict that the defendant,long prior to the time it employed the deceased, had properly blocked all of its frogs, switches, and guard rails at said switches, and that the deceased, during the time of his employment, up to his death, "saw and knew" that said switches, frogs, and guard rails were blocked and safe to pass over. It is then stated that the defendant, carelessly and negligently, and without due caution and care for the safety of the deceased in operating its train, and in coupling and uncoupling its cars, over said switch and over said guard rails at the crossing of said Main street, failed and neglected to block said space or opening between said guard rails and said south rail as above described; and that on said 14th day of March, 1893, the deceased was carefully, and in the due performance of his duty, engaged in coupling cars on said spur switch on and over said open space between said guard rail and the south rail of said track, and on and over the crossing of said Main street. As he was so carefully engaged in coupling cars and moving westward be-

tween the cars and over said space or opening, he stepped into said opening, whereby his left foot became wedged and fastened between said rails, so that it became then and there impossible for him to withdraw his foot; and, while it was so held the car that he was coupling ran over him, and then and there killed him, without any fault on his part. The verdict then proceeds as follows: "That, at the time he was so caught and run over and killed, he did not know, and never had known, that said space was not blocked or made safe for him to couple cars over the same; but from the fact that all the frogs, switches, and guard rails at said switches on and along the defendant's said road were properly and safely blocked, the deceased believed, and had reason to believe, said space where his foot caught, and where and by means of which he was killed, was safely and properly blocked at the time he was killed as aforesaid. * * * That the defendant, all the time that the deceased was in its employ, knew that said space was not blocked nor in any manner made and kept reasonably safe for the deceased and its other trainmen to switch and couple and uncouple cars over the same; * * * yet the defendant, for and during all of said time, negligently and carelessly failed and refused to block the same or render it reasonably safe." At the time of the accident, the verdict states "that it was necessary for the decedent to give his entire attention to his duties in coupling cars, and that he did not see where he stepped, and did not know exactly where he was on said track at the time he was caught and killed. It is then further stated as follows: "That there were about forty-five guard rails placed over the highway crossings on said railroad between Butler and Peru during the period that the said deceased was so employed by said defendant, and also about five street crossings at which such guard rails were placed between the rails of said railroad on its side tracks, and that the purpose of placing said guard rails at such crossings was to hold and contain gravel and other hard substances on a level with the tops of the rails at said crossings, and to avoid planking the same; that none of said guard rails during said period were blocked, nor were said crossings, except in one other instance, a part of any system of switching upon said road."

We have in part stripped the special verdict of conclusions and immaterial matter, and the above facts may be said to be those which are essential to the question involved. The theory upon which the verdict proceeds to impute negligence

to the appellant is founded on the omission of the latter to block the open space at the guard rail. This rail, it appears, was 45 feet in length, and located at or near a street crossing in Columbia City. The opening at the east end of the rail, where the accident occurred, began at a point where the guard rail was 2⅜ inches from the main rail, and continued to increase in width until, at the end of the guard rail, it was 17 inches wide. The duty which it is claimed the appellant ought to have performed was to have placed a wooden block or wedge in the opening, which block, as the jury find, should have been 16 inches long and 2 inches thick. It is seemingly contended by counsel for appellee that the failure to block this opening was negligence *per se*. It is said by some of the authorities that the operation of a railroad without blocking its frogs and switches is not, as a matter of law, negligence. See Railway Co. *v.* Lewis, 24 Neb. 848, 40 N. W. 401; Hewitt *v.* Railway Co., 67 Mich. 61, 34 N. W. 659. The test of liability would seem to be in such cases, not whether the railroad company had omitted to block its frogs and switches, as it might have done, but whether the places where its employees were required to work were, on account of such omission, not reasonably safe for the performance of such work when such employees, under the particular circumstances in the case, were exercising ordinary care. But we may pass this feature of the case without further comment, and proceed to consider the one so earnestly pressed and argued by counsel for appellant.

They contend that the facts disclose that the condition of the guard rail was the same at and prior to the employment of the deceased, and so continued during his entire term of service until the time of the accident; that its dangerous condition, if such was the fact, was open and obvious to all, and clearly discernible by the deceased, had he, under the circumstances, exercised the sense of sight with which he must be presumed to have been endowed. Therefore it is insisted that the risk of the alleged hazard on account of the unblocked guard rail, to which, as claimed by appellee, the deceased was subjected, was one of the risks which he assumed, and thereby waived any right of recovery. We recognize the familiar doctrine, so often and so universally asserted, that the master, in the employment of his servants, impliedly obligates himself to exercise ordinary care to furnish them with a reasonably safe place to work, and also with reasonably safe machinery, appliances, and instrumen-

talities with which to perform their duties. The test or standard in such matters, upon the part of the master, is ordinary care; but, in order to ascertain what would constitute such care in the particular case, the dangers of the service in which the employee is engaged is a factor, and must be considered. What might prove to be the exercise of ordinary care under some circumstances might not be such in others. Elliott, R. R. § 1273. The general rule relative to the risks which a servant assumes under his employment to discharge hazardous duties is that he assumes such risks as are ordinarily incident to the discharge of the duties from cause, open and obvious, the dangerous character of which he has had an opportunity to ascertain; but he does not assume the risks of unsafe premises, defective machinery, appliances, or instrumentalities, unless he has had, or may, from the facts or circumstances, be presumed to have had, knowledge or notice thereof. Griffin *v.* Railway Co., 124 Ind. 326, 24 N. E. 888; Power Co. *v.* Murphy, 115 Ind. 566, 18 N. E. 30; Swanson *v.* City of Lafayette, 134 Ind. 625, 33 N. E. 1033; Railway Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359; Stone Co. *v.* Wray, 143 Ind. 574, 42 N. E. 927; Elliott, R. R. §§ 1288, 1289. The doctrine of the assumption of risks upon the part of a servant has been frequently applied by the higher courts in cases where the death or injury complained of was attributable to unblocked frogs, switches, or guard rails of railroad companies. In the following cases, decided by this court, the same question was involved as in the case at bar. Railway Co. *v.* McCormick, 74 Ind. 440; Ames *v.* Railway Co., 135 Ind. 363, 35 N. E. 117; Sheets *v.* Railway Co., 139 Ind. 682, 39 N. E. 154. Among those of sister states in which the same question was presented, see Spencer *v.* Railroad Co. (Sup.) 22 N. Y. Supp. 100; McNeil *v.* Railroad Co. (Sup.) 24 N. Y. Supp. 616; Appel *v.* Railway Co., 111 N. Y. 550, 19 N. E. 93; McGinnis *v.* Bridge Co., 49 Mich. 466, 13 N. W. 819; Hewitt *v.* Railway Co., *supra*; Railway Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55; Railway Co. *v.* Davis, 54 Ark. 389, 15 S. W. 895; Holum *v.* Railway Co., 80 Wis. 299, 50 N. W. 99; Rush *v.* Railway Co., 36 Kan. 129, 12 Pac. 582; Railroad Co. *v.* Risdon's Adm'r, 87 Va. 335, 12 S. E. 786.

It is a well-affirmed legal principle that, where a danger or hazard of the business is alike open to the observation of all, the master and the servant, under such circumstances, are on an equality, and the former is not liable to the latter for

an injury resulting from such danger incident to the business. Swanson *v.* City of Lafayette, *supra*; Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52. It is also well settled that an employee who has knowledge, or who by the exercise of ordinary diligence or observation can learn of the infirmities, imperfections, or hazards of implements, machinery, or appliances with which he works, or the hazards of the premises, where he performs the duties of his employment, and continues in the service without objections, and without the promise of repairment or change upon the part of the master, will be deemed to have assumed all the risks incident to such defects and hazards, and thereby will be held to have waived his right to recovery for injuries resulting therefrom. While this rule cannot be extended so as to cast upon the employee the duty to search for latent defects in the machinery, appliances, and instruments used by him, or about which he works, or the hidden dangers of places where he is engaged in the line of his duty, yet it does go to the extent of holding that he assumes the consequences resulting from such defects and dangers as are apparent to him, or such as, by the exercise of ordinary diligence, and by giving proper heed to his surroundings, he might have discovered. Rietman *v.* Stolte, 120 Ind. 314, 22 N. E. 304; O'Neal *v.* Railway Co., 132 Ind. 110, 31 N. E. 669.

The facts in the case at bar, when tested in the light of the well-settled principles to which we have referred, do not, in our opinion, entitle appellee to a recovery. The decedent, as the verdict discloses, was a man of mature years, and well skilled as a railroad brakeman. His employment by appellant began on February 9, 1893, at which time, and prior thereto, the guard rail in controversy was in the same condition, and so continued up to the time of the fatal accident. He had served from the date of his employment continuously as brakeman on one of appellant's local freight trains, until his death, which, as it is stated, occurred on March 14, 1893. Each day, except Sunday, during said period of his employment, the train on which he was braking and switching passed the place where the guard rails in dispute were located. The main track and the side track at that point were but 7¾ feet apart. It is apparent, therefore, that appellee's decedent, prior to the accident, passed about 28 times very near to the open space occasioned by the unblocked guard rail. At the time of the accident, he was engaged in the line of his duty, as the jury find, in coupling cars over the opening in question.

As to whether, at any time previous to his death, he had or had not engaged in switching and coupling cars at the point in controversy, the verdict does not expressly disclose. The unblocked opening, into which he stepped and caught his foot, was 9 feet in length, 2⅜ inches wide at one end, and 17 inches wide at the other. It is certainly manifest from the facts that this unblocked space or opening was so plain and obvious that it could have been seen by the deceased when so close to it as he was at divers times during the period of his employment, had he given ordinary heed to his surroundings. It would surely seem that he would have been able to have discovered this obvious unblocked space at the time of the accident, when he was engaged in switching and coupling cars immediately about and over the opening, had he exercised ordinary care or heed, as required, in regard to his surroundings. The jury apparently offer an excuse for his failure to exercise such care or heed by concluding, as they do, that it was necessary at that time for him to give his entire attention to his duties, and therefore he "could not and did not see" where he was placing his foot. If not aware of the condition of the place about and over which he was moving his foot while coupling cars, common prudence, at least, ought to have admonished him to ascertain its character before placing his body, as he did, between the moving car and the one to which it was to be coupled.

The argument of counsel for appellee is that as it appears that all of appellant's guard rails at switches were blocked, and that deceased, at the time he was killed, and "always up to the time of his death, saw and knew that said switches, frogs, and guard rails at said switches were properly blocked and safe to pass over, and couple and uncouple cars and make up trains over the same," therefore he had a right to believe that the guard rails at the crossing of Main street, in Columbia City, where the accident occurred, were in the same condition. This argument is not tenable, and is certainly without force when the facts found by the jury are considered, which reveal that appellant's guard rails, some 50 in number, at other highways and street crossings between Butler and Peru, were not blocked. The fact that the decedent was so circumspect as to see and know at all times during his employment that appellant's frogs, switches, and guard rails at switches, along the route over which he

Injury to Brakeman—Unblocked Rail—Assumption of Risk.

worked, were properly blocked and safe, makes it appear singular that such caution or heed upon his part did not also enable him to discover that the guard rails at or near the crossing of Main street, in Columbia City, were not blocked. Considering the obvious character of these guard rails, and the size of the opening of the south rail, in which the foot of the deceased was caught, and the many opportunities which he had to ascertain that these rails were not blocked, it becomes apparent, we think, that prior to the accident he must have been aware of their condition, or by the exercise of ordinary diligence or observation he could have had knowledge that the opening in question was not blocked.

It certainly is evident, when all the facts are considered, that the opportunities of the deceased to know or learn the condition of these rails were virtually equal to those of appellant. In Railway Co. *v.* McCormick, *supra*, the employee caught his foot in an unblocked frog, and, while in that situation, was run over and killed by a car. It appeared in that case that the switches and frogs of the railroad company were in the same condition during the entire period of the service of the deceased. This court held that, under the circumstances, the condition of the frog, to which the death of the servant was imputed, was a risk incident to the business which he assumed, and it was therefore held that the railroad company was not liable. In the case of Ames *v.* Railway Co., *supra*, the employee was killed by catching his foot in an unblocked opening between the abutting rails of a switch, and, while in that condition, was run over and killed by a moving train. It was held by this court that the question presented in that appeal was not one of contributory negligence, but one involving the assumption of the risk as incident to the service. It was there asserted that it was not only incumbent upon the plaintiff in such cases to show freedom from contributory negligence, but that it also devolved upon him to show, by facts, that the injury for which the recovery was sought was not the result of some hazard of the service assumed by those employed therein; and it was held, under the facts in that case, that the railroad company was not liable, for the reason that the deceased servant had assumed the risk incident to the use of the unblocked switch. In the case of Sheets *v.* Railway Co., *supra*, the servant was killed by catching his foot in an unblocked "switch angle," and, while in that situation, was run over and killed by a car

which he was attempting to couple. It was alleged in the complaint that the deceased did not know, and had no means of knowing, that the angle or frog in question was not blocked; that at no time while in the service of the railroad company did he have the means or opportunity to inspect the angle or frog in question, and thereby discover the defect; that, at the time of the accident, the ground was covered with snow, so that it was impossible to discover the absence of the block. The complaint was held upon demurrer to be insufficient to entitle the plaintiff to a recovery, and, in the course of the opinion, DAILEY, J., speaking for the court, said: "The duties of a brakeman include the handling of switches, and the coupling and switching of cars, and, in the performance of these duties, he could readily learn if blocks had been provided to lessen the danger of the service. The danger incident to an unblocked frog or switch is in no sense a latent one. On the contrary, it must be obvious to the most casual inspection. Any man of mature years must know that, if he puts his foot into an acute angle formed by the two converging lines of rail, there will be danger of his foot being caught or held thereby." It was held in that case that the employee assumed the risk incident to the unblocked frogs and switches of the railroad company in whose service he was engaged as a brakeman at the time of the accident. The holding in that appeal, under the facts, which presented a stronger case in favor of the plaintiff then do those in the case at bar, is virtually decisive that there can be no recovery in this action. The danger of the unblocked rail in this case, in the light of the facts, is certainly shown to have been open and obvious to all, and the deceased had many opportunities to see it; and, under a well-settled doctrine heretofore mentioned, it must be presumed that he saw what he might have seen had he looked, and there can be no escape from the conclusion that, by his continuation in the service, he assumed the risk or hazard which resulted in his lamentable death.

For the reasons stated, the facts set out in the special verdict do not entitle appellee to a judgment against appellant. We have also considered the evidence, and it may be said upon no view thereof can a recovery by the appellee be sustained. The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain appellant's motion for judgment in its favor on the special verdict.

NOTE

Unblocked Frogs and Guard-Rails.—In the absence of statutory requirement, a railroad company would seem to be under no obligation to block the frogs and guard-rails in its tracks for the safety of employees. St. Louis, etc., R. Co. *v.* Davis, 54 Ark. 389, 26 Am. St. Rep. 48; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682; Missouri Pac. R. Co. *v.* Lewis, 24 Neb. 848; Ireland *v.* Gardner, (Supreme Ct.) 7 N. Y. Supp. 609; Spencer *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 196; McNeil *v.* New York, etc., R. Co., 71 Hun (N. Y.) 24; Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550; Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335. See also San Antonio, etc., R. Co. *v.* Gillum, (Tex. Civ. App. 1895) 30 S. W. Rep. 697.

Where it appeared from the evidence that unblocked switches had been in use throughout the country for years, and it might reasonably be inferred that the blocking of switches was, up to that time, only an experiment, the court held that there was no obligation on the company to block its frogs for the safety of its employees. Chicago, R. I. & P. R. Co. *v.* Londergan, 28 Am. & Eng. R. R. Cas. 491.

In Southern Pac. Co. *v.* Seley, 152 U. S. 145, it was held error to have refused the following instruction: "The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

In Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, it was held that whether a failure to block guard-rails was negligence on the part of the defendant was a question of fact for the jury to determine. Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364.

A brakeman who enters the services of a railroad company and remains in it without complaint after he is aware of the condition of the frogs in use, assumes the risk of accidents arising therefrom, and cannot recover for injuries sustained while coupling cars through his foot having caught in an unblocked frog. Lake Shore & M. S. R. Co. *v.* McCormick, 74 Ind. 440, 5 Am. & Eng. R. R. Cas. 474; McGinnis *v.* Canada Southern B. Co., 8 Am. & Eng. R. R. Cas. 135; Rush *v.* Missouri Pac. R. Co., 28 Am. & Eng. R. R. Cas. 484; Burlington, C. R. & N. R. Co. *v.* Coates, 15 Am. & Eng. R. R. Cas. 265. The burden of proving that the employee had knowledge of the condition of the frog and continued in the employment of the company without making complaint is on the defendant. Burlington, C. R. & N. R. Co. *v.* Coates, 15 Am. & Eng. R. R. Cas. 265.

HANNIGAN

v.

LEHIGH & H. R. RY. CO.

(*Court of Appeals of New York, Nov. 22, 1898.*)

Coupling Cars—Assumption of Risk.*—The meeting of the drawheads is an ordinary incident of coupling cars, and, therefore, a risk assumed by one engaged in such work.

Same—Injury to Brakeman—Proximate Cause.—Plaintiff's hand was caught between the drawheads, while he was coupling cars, and injured. *Held*, that plaintiff could not recover upon the ground of the absence of deadwoods on such cars, it appearing that the presence of deadwoods on cars does not prevent the drawheads from coming together, and their absence was not, therefore, the proximate cause of the injury.

Same—Defective Appliances.—Plaintiff could not recover because of a defective appliance, where there was no evidence tending to show that his injury was caused by such defect.

Same—Contributory Negligence.—Where an employee is injured while coupling cars through the absence of a proper appliance, he cannot recover if he could have discovered its absence, before attempting to make the coupling, by the exercise of reasonable care.

APPEAL by defendant from supreme court, general term. Second department. *Reversed.*

Case Stated.

This action was to recover for personal injuries alleged to have been caused by the defendant's negligence. The allegations of the complaint were that the defendant furnished for the use of the plaintiff a freight car with broken, defective, unusual, unsafe, and dangerous coupling appliances, in that such appliances were mismatched, uneven, and entirely useless and inadequate for the purposes for which they were placed in use by the defendant, and that it negligently and carelessly permitted, used, and maintained the same. The answer contained a general denial. At the close of the plaintiff's evidence, the defend-

*See notes at end of case.

ant moved for a nonsuit upon the grounds—"First, that the accident which caused the plaintiff's injury was, under the circumstances of this case, a risk which he assumed as an employee of this defendant, and for which the defendant is not liable; second, that there is no evidence of negligence on the part of the defendant which caused the accident to the plaintiff on this occasion; third, that no negligence or omission of duty on the part of the defendant has been shown." That motion was denied, and the defendant excepted. When the evidence was finally closed, the defendant again renewed its motion for a nonsuit upon the grounds already stated, and also upon the further ground that the violation of the rule requiring the use of coupling sticks was contributory negligence on the part of the plaintiff, and prevents a recovery by him. That motion was also denied, and the defendant excepted. At the time of the accident the plaintiff was a brakeman and had been in the employ of the defendant about three months. His work was upon freight trains running between Phillipsburg and Maybrook. The accident occurred at about 7 o'clock on the morning of December 5, 1893, at Hudson Junction. The train arrived there about that hour. The plaintiff uncoupled the engine and tender from the head car of the train, so that it might take a fresh supply of water from the tank or crane at that place. The engine was then run back to the train, and while coupling the tender to the car the plaintiff's hand was caught between the drawheads and injured. There were no deadwoods upon the car to which the tender was being coupled. The plaintiff gave evidence to the effect that if there had been double deadwoods upon the car to which the tender was coupled his injury would not have occurred, and that cars in common use ordinarily have double deadwoods. Still, it is manifest, from all the evidence in the case, that the purpose of deadwoods is not to prevent the drawheads from coming together, and that in many, if not most, cases the drawheads come in contact before the bumpers meet. The plaintiff upon his cross-examination testified: "These drawheads are between the bumpers on the car and the engine. They extend from either end of the car. They are attached to a bar that runs back under the sill of the car. At the end of these drawheads there is a sort of a spring, so that when the drawheads strike there is a spring to the car that way that relieves it. That is what is called slacking the train. In the case of cars, when you are called upon to couple them, the drawheads and bumpers come

together at the same time about. They will strike, and this spring will give, and then the bumpers will come together. As a general thing, the bumpers will generally come together first, but they just strike so as to give an opportunity to the brakeman to insert the link." Upon examination by his own counsel he further testified: "The bumpers generally strike first on some of the cars; sometimes the drawheads and bumpers strike about together. When the bumpers strike first, the drawheads cannot come together at all." The plaintiff's witness Drake also testified: "In coupling cars there is some cars that the drawheads come together first and others the bumpers comes together first. In cars where the drawheads come together first, sometimes the bumpers touch afterwards; the most of them will. If the cars are struck pretty hard, the bumpers will come together. When they are struck hard, the drawheads strike first, and then the bumpers come together with great force, and when they come down slowly the drawheads strike and the bumpers do not, if they don't strike very hard. They may strike very light, though. If they strike very light, it depends upon what cars they are whether the drawheads touch when the connection is made and the bumpers do not strike at all. There is a great difference in cars, and there is a difference in drawheads, and a difference in the size of bumpers, and there is also a difference in the length of drawheads. It is a fact that some of them project further from the front of the car than others. There is a variation of a couple of inches, I should think. I cannot tell how far they ordinarily project in front of the bumper. In some cases they go further. I would not say two or three inches; not that far. It is very seldom that you see one two inches. I never noticed whether they project two or three inches in front of the bumpers. I can't tell whether they do come that far or not. It is a fact when the drawheads are struck they are pushed back under the car, if there are no bumpers there. Whether there are bumpers there or not, they go back, and they can be thrown forward." Therefore it is apparent from the evidence of the plaintiff, as well as that of the defendant, that the coming together of the drawheads is an ordinary incident of coupling cars, whether there are deadwoods on the cars or not. Indeed, the proof shows that the cars of various railroads are not equipped with deadwoods at all.

John G. Milburn, for appellant.
Lewis E. Carr, for respondent.

Hannigan *v.* Lehigh & H. R. Ry. Co

MARTIN, J. (after stating the facts). The first proposition contended for by the plaintiff is that it was the duty of the defendant to furnish cars equipped with deadwoods which would prevent the drawheads from coming in contact when a coupling was being made. It is apparent from the evidence in this case that the purpose of deadwoods is not to prevent the drawheads from coming together, but they are placed upon cars for quite a different purpose. The single question presented upon this appeal is whether it is the duty of a railroad company to so equip its cars and trains that the drawheads thereon shall not come in contact when cars are being coupled. This court has several times considered the purpose of drawheads, and held that it was negligence for a railroad company to use cars where the drawheads would not come in contact. Gottlieb *v.* Railroad Co., 100 N. Y. 462, 3 N. E. 344; Goodrich *v.* Railroad Co., 116 N. Y. 398, 22 N. E. 397. In the case at bar it has been held that it was negligence to use a car where the drawheads would meet. We think the evidence shows quite clearly that the meeting of the drawheads is an ordinary incident of coupling cars, and a condition to be expected when a coupling is made, and was therefore one of the ordinary risks of the service in which the plaintiff was engaged. His employment was necessarily hazardous, and when he entered it he assumed all the risks and perils of the service and those that were known to him or were apparent to ordinary observation. That one of the risks which he assumed was the danger of injury from the meeting of drawheads, when coupling cars, there can, under the evidence, be no doubt. Indeed, it is a matter of common knowledge that drawheads to cars are liable to, and ordinarily do, come in contact when cars are being coupled, and that a risk of injury therefrom exists whenever a brakeman is performing that service. Therefore, under the evidence, it is obvious that the plaintiff's injury arose from a cause which was included in the risks which he assumed.

Coupling Cars—Assumption of Risk.

But it is said that the defendant was negligent in using a car upon which there were no deadwoods. If that were assumed, still the plaintiff could not recover unless he proved that their absence was the cause of his injury. When we look at the record, we find that practically all the evidence in the case is to the effect that the function of deadwoods is not to prevent drawheads from coming together, and, at most, there is but a mere scintilla of evidence to the contrary. Under these circum-

Same—Injury to Brakeman—Proximate Cause.

stances, this court would not be justified in holding that the plaintiff's injury was the result of the defendant's omission to place deadwoods upon the car in question. As was said by this court in Hudson *v.* Railroad Co., 145 N. Y. 408, 412, 40 N. E. 8, 9: "Where the evidence which appears to be in conflict is nothing more than a mere scintilla, * * * this court will still exercise jurisdiction to review and reverse, if justice requires." Applying that rule, it is evident that the absence of deadwoods on the defendant's car was not the proximate cause of the plaintiff's injury, and hence he could not properly recover upon that ground.

It is true, as claimed by the plaintiff, that he testified upon the trial that the drawhead in the car was loose and broken, and that "the spring was out of the drawhead,—out of the car." This was the only evidence in the case which tended to sustain the allegations of the complaint that the coupling appliances were broken or defective. But we find no evidence in the record to show, or which even tends to show, that the plaintiff's injury in any way resulted from that cause.

Same—Defective Appliances.

It is, at least, problematical if the plaintiff sufficiently established his freedom from contributory negligence to justify the submission of the case to the jury. It appears, from his own testimony, that it was "perfectly light" when he uncoupled the tender from the car; that he saw the drawhead and could see the link. It must therefore, have been sufficiently light when he undertook to recouple them to see the absence of the deadwood if he had looked; so that, if its absence was the cause of his injury, he could, by the use of ordinary prudence and reasonable care, have discovered it, and was negligent in not doing so. But it is doubtful if that question is before us, as there is no exception which clearly raises it.

Same—Contributory Negligence.

But, independently of the question of contributory negligence, we are of the opinion that the court erred in denying the plaintiff's motion for a nonsuit, and that for that reason the judgment should be reversed. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed, etc.

NOTE.

Coupling Cars—Assumption of Risk.—It is a settled principle of law that a servant, when he enters the service of the master, assumes all the ordinary risks of such service, and this is true where the duty

is a hazardous, one, such as coupling cars. Mobile, etc., R. Co. *v.* George, 94 Ala. 199; Alabama G. S. R. Co. *v.* Richie, 99 Ala. 346; Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374; Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113, 15 Am. & Eng R. Cas. 261; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 28 Am. & Eng. R. Cas. 308; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Clark *v.* Missouri Pac. R. Co., 49 Kan. 654; Dysinger *v.* Cincinnati, etc., R. Co., 93 Mich. 646; Crutchfield *v.* Richmond, etc., R. Co., 78 N. Car. 300; Johnson *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 95; Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352, 8 Am. & Eng. R. Cas., N. S., 552.

MISSOURI PAC. RY. CO.

v.

LYONS.

(*Supreme Court of Nebraska, April 21, 1898.*)

Injury to Employee—Evidence as to Contributory Negligence.—Evidence examined, and *held* to sustain the jury's finding that the death of plaintiff's intestate was not caused by his negligence.

Assumption of Risk.*—When one enters the employment of another agreeing to serve him for a stipulated salary or wage, he thereby assumes, in the absence of an express contract to the contrary, the ordinary perils incident to that service, and included in these is the liability to injury at the hands of a negligent fellow servant.

Same.—The general rule is that where a master is not guilty of negligence in the selection or the retention of servants, or in furnishing them with suitable appliances for the performance of the work in which he employs them, he is not answerable to one of them for an injury caused by the negligence of a fellow servant while both are engaged in the same work in the same department of the master's business.

Same.—Where two switching crews are in the employ of the same railway company, subject to the control and direction of the same

**Note.*—The doctrines stated in the syllabus are so well established that it is deemed unnecessary to cite the numerous cases supporting them. See generally 14 Am. & Eng. Enc. Law; 7 *Ibid.* (2nd Ed.): 5 Rap. & Mack's Dig.; McKinney on Fellow Servants; Woods' Master and Servant, and numerous cases in Am. & Eng. R. Series.

yard master, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then the two crews and the members thereof are consociated in the same department of duty or line of employment, and each member of one crew is the fellow servant of each member of the other crew.

(Syllabus by the Court.)

ERROR by defendant to Douglas county district court. *Reversed.*

B. P. Waggener and *John C. Watson*, for plaintiff in error.
Mahoney & Smythe, for defendant in error.

NORVAL, J., and RAGAN, C. The switch yard of the Missouri Pacific Railway Company at Omaha, Neb., extends north and south, and is something more than a quarter of a mile in length, and it is down grade from the south end thereof. This switch yard is covered with a network of tracks. The first four, counting from the east side of the yard, are called the main-line track, the old main-line track, the train track, and the west track, respectively. On the 11th day of June, 1893, two shifting engines and crews were at work in this yard. The crew working in the south part of the yard was composed of the engineer and fireman of the switch engine, and George Duncan, James Mordant, and Samuel Deems. Duncan was the foreman of the south crew. The crew working in the north end of the yard was composed of the engineer and fireman of the switch engine and B. F. Miller, John R. Hughes, and George Lyons, Miller being the foreman of that crew. All the men in both these crews were subject to the direction and control of the master of the switch yard named Kennedy. He seems to have employed the men and had authority to discharge them. From day to day he determined what men should work in the switch yards and in what part of the yards each crew should work. The foreman of each crew had the direction of the men under his charge as to how the work should be done and what each should do, but was vested with no other control of the men under him. No person in one crew had any direction or control over the members of the other crew. While each crew was assigned to work at a particular end of the yard, this seems to have been a matter of convenience, as either crew was at liberty to go to any part

Case Stated.

of the yard if the business in hand required. Both crews were engaged in transferring cars from one track to another; the crew at the south end taking cars from certain tracks or sidings, putting them on one of the tracks already mentioned, and running the cars down towards the north end of the yard, and there turning them over to the crew at work in the north end for further disposition. As it was down grade from the south to the north end of the yard, it was customary, when a car was put on a track to go to the north end of the yard, for either Deems or Mordant to "ride the car down." On the date above stated, and at the time of the happening of the casualty hereinafter referred to, there was a number of cars standing on the train track, the third track from the east side of the yard, and standing pretty well down towards the south end thereof. A coal car was standing on the old main track pretty well towards the south end of the yard. Lyons, one of the north crew, was standing west of the west track; or, in other words, there were four tracks between him and the old main-line track. The north crew switching engine was on the old main-line track pretty well down towards the north end of the yard. With things in this situation, the crew at the south end of the yard switched a box car loaded with coal on the old main-line track. As this car started down the grade, Deems, one of Duncan's crew, was about to board it for the purpose of "riding it down," when Duncan said to him: "Let that car go; let Jimmie [that is, Mordant, the other man helping him] catch some of these cars." For some reason, not clearly shown by the record, Mordant did not "ride the car down," and it went down without any one upon it, came in contact with the coal car, loosened the brakes thereon, and both cars started down the old main-line track towards the north end of the yard. The foreman of the crew in the north end, seeing these two cars, "hallooed" to warn the men on the switch engine of the approaching cars. Lyons, presumably for the same purpose, ran east towards the old main-line track, and either because he did not observe the proximity of the two loose cars, or because he attempted to board them, was struck by one of those cars, and injured, from the effects of which he died. His widow, as administratrix, brought this suit against the railway company for damages. She had a verdict and judgment, to reverse which the railway company has prosecuted here a petition in error.

1. The administratrix in her petition claimed that the railway company had been guilty of negligence in employing or retaining in its employ Deems and Mordant, two of the men

of the south crew, knowing that they were incompetent. We do not understand that the judgment in this case rests upon a finding made by the jury that the railway company was guilty of negligence in employing or retaining in its employ these two men, and the evidence in the record before us would not sustain a finding that the railway company had been guilty of negligence in employing or retaining in its employ either of these two men.

2. The administratrix also claimed in her petition that the proximate cause of the death of her husband was the negligence of the foreman, Duncan, in permitting this box car loaded with coal to run down the old main-line track with no one on it to control and stop it. We assume, for the purposes of this case only, that Duncan's permitting this box car loaded with coal to run down this track, without some one on it to control and stop it, was negligence, and that this negligence was the proximate cause of the death of Lyons.

3. It is strenuously insisted by counsel for the railway company that Lyons' untimely death was the result of his own negligence; that he was standing some distance west of the old main-line track, on which the two wild cars were running when he first discovered them; that he was in a place of safety, and that he voluntarily ran to the track on which the two cars were moving, and by reason of neglecting to observe their proximity to him, or while attempting to board them, received his injury; that his presence at the place where he was injured was not due to an order of his foreman, nor made necessary by any of the demands of his employment; and therefore the finding of the jury that Lyons' injury was not the direct result of his own negligence is unsustained by sufficient evidence. But when we consider the circumstances surrounding Lyons at the time he left the place of safety; the two cars running down grade towards an engine standing upon the same track, on which were an engineer and fireman; the certainty of a collision, unless the cars were stopped; and the probabilities that, if a collision occurred, not only would there result a destruction of the property of the railway company, but perhaps the loss of human life,—we are not disposed to disturb the jury's finding, which acquitted Lyons of negligence.

Injury to Employee—Evidence as to Contributory Negligence.

Imprudent and unwise his conduct may have been, unselfish it certainly was; but, when examined in the light of all the surrounding circumstances, we cannot say, as a matter of law, that it was

negligence. Railway Co. *v.* Krayenbuhl, 48 Neb. 553, 67 N. W. 447.

4. The district court instructed the jury as follows: "I instruct you, gentlemen, that on the 11th day of June, 1893, the foreman, Duncan, and Lyons were not fellow servants, within the rule that exempts the master from liability for the negligence of one fellow servant causing injury to another; but, on the contrary, said Duncan was intrusted by the defendant with the control of such a part of the defendant's business as impressed upon him the duty of so conducting said part of said business as not to negligently or carelessly subject other servants of the company to unusual and unnecessary danger; and, if yon find from the evidence that said Duncan was guilty of negligence in the discharge of said duty, such negligence is chargeable to the defendant." To the giving of this instruction the railway company excepted. Counsel for the administratrix concedes that, if this instruction was erroneous, the judgment must be reversed. It was doubtless the doctrine of the common law that a master was not liable for an injury inflicted upon one servant through the negligence of a fellow servant. This is the English rule, and, except where modified by statute, is the doctrine of the American courts. See the rule stated and the authorities collated in 7 Am. & Eng. Enc. Law, p. 821; 3 Wood, Ry. Law, § 388. This doctrine results from the nature of the contract between the employer and the employee. When one enters the employment of another, agreeing to serve him for a stipulated salary or wage he thereby assumes, in the absence of an express contract to the contrary, the ordinary perils incident to that service, and included in these is the liability to injury at the hands of a negligent fellow servant. The doctrine was thoroughly discussed by EVANS, J., in Murray *v.* Railroad Co., 1 McMul. 385, and by SHAW, C. J., in Farwell *v.* Railroad Co., 4 Metc. (Mass.) 49, the two leading cases in this country; and the rule is there declared to be founded, not only upon principles of justice, but considerations of public policy as well. To this general rule exempting the master from liability for the injury of one servant caused by the negligence of a fellow servant there is this exception: the master himself must not have been guilty of negligence in the selection or retention of the offending servant, tool, or appliance. To bring the master within the protection of the rule, the relation existing between the offending and the injured

Assumption of Risk.

servant must not have been that of master and servant; the offending servant must not have been the *alter ego* of the master, the negligent servant must have been a co-laborer, a co-servant,—that is, a fellow servant with the injured one in the performance of the work in and about which the injury occurred. The general rule is admirably stated by the supreme court of Massachusetts in Farwell *v.* Railroad Co., *supra*, in the following language: "Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service."

Same.

With an apology to the profession for this digression, and statement of a rule so familiar, we now proceed to inquire whether Duncan and Lyons were fellow servants, within the meaning of the rule just stated. This is always the difficult question in this class of cases, and he who asserts that two servants of the same master, under a certain state of facts, are or are not fellow servants, will have little trouble to find some case which will tend to support his contention. Counsel for the administratrix insists that Duncan and Lyons were not fellow servants, and cities in support of this contention the following cases: Railroad Co. *v.* Moore, 29 Kan. 632; Railroad Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Garrahy *v.* Railroad Co., 25 Fed. 258; Railway Co. *v.* Reed (Tex. Sup.) 31 S. W. 1058; Chesson *v.* Lumber Co. (N. C.) 23 S. E. 925; Gowen *v.* Bush, 22 C. C. A. 196, 76 Fed. 349; Railroad Co. *v.* Hilliard (Ky.) 37 S. W. 75; Railroad Co. *v.* Talley (Tex. Civ. App.) 39 S. W. 206; Railroad Co. *v.* Dwyer, 57 Ill. App. 444; Pendergast *v.* Railway Co. (Sup.) 41 N. Y. Supp. 927; Tramway Co. *v.* Crumbaugh (Colo. Sup.) 48 Pac. 503; Rouse *v.* Downs (Kan. App.) 47 Pac. 982. On the other hand, counsel for the railway company insist that Duncan and Lyons were fellow servants, and in support of their contention cite the following cases: O'Leary *v.* Railroad Co., 52 Ill. App. 641; Clarke *v.* Pennsylvania Co. (Ind. Sup.) 31 N. E. 808; Railway Co. *v.* Adams (Ind. Sup.) 5 N. E. 187; Railroad Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Warmington *v.* Railroad Co., 46 Mo. App. 159; Wellman *v.* Railway Co., 21 Or. 530, 28 Pac. 625; Railway Co. *v.* Needham, 11 C. C. A. 56, 63 Fed. 107; Railroad Co. *v.* Mase, 11 C. C.

Same.

A. 63, 63 Fed. 114; Railroad Co. *v.* Hoover (Md.) 29 Atl. 994; Herrington *v.* Railway Co. (Sup.) 31 N. Y. Supp. 910; Thom *v.* Pittard, 10 C. C. A. 352, 62 Fed. 232; Ell *v.* Railroad Co. (N. D.) 48 N. W. 222; Fraser *v.* Lumber Co., 45 Minn. 235, 47 N. W. 785; Railway Co. *v.* Robb, 36 Ill. App. 627; Unfried *v.* Railroad Co., 34 W. Va. 260, 12 S. E. 512; Kerlin *v.* Railroad Co., 50 Fed. 185; Railroad Co. *v.* Andrews, *Id.* 728; Marshall *v.* Schricker, 63 Mo. 308; Coal Co. *v.* Johnson, 6 C. C. A. 148, 56 Fed. 810; Harley *v.* Railroad Co., 57 Fed. 144; McBride *v.* Railway Co. (Wyo.) 21 Pac. 687; O'Brien *v.* Dredging Co. (N. J. Sup.) 21 Atl. 324; Sherrin *v.* Railroad Co. (Mo. Sup.) 15 S. W. 442; Railroad Co. *v.* May, 108 Ill. 288.

Not all the cases cited by counsel sustain their respective contentions, and we shall not attempt a review of these cases or any of them; nor shall we attempt to formulate a rule which will afford a test for determining in all cases whether two servants are or are not "fellow servants," within the meaning of that term, but leave that question to be determined in each case from the particular facts and circumstances of the case in which the question is presented. In Moore *v.* Railroad Co., 85 Mo. 588, it was said: "If we may venture a general proposition on the subject, it is that all are fellow servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to each other except as co-laborers without rank, under the direction and management of the master himself or of some servant placed by the master over them." The supreme court of North Dakota in Ell *v.* Railway Co., 48 N. W. 222, laid down this proposition: "The negligence of a servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant, as contradistinguished from the duties of the master to his employees." In O'Leary *v.* Railroad Co., 52 Ill. App. 641, it was held that two switching crews employed in the same railroad yard, the one in delivering cars and the other in receiving them as kicked across the main tracks, are fellow servants. The supreme court of Indiana in Clarke *v.* Pennsylvania Co., 31 N. E. 808, held that a member of one section gang and the boss of another section gang employed by the same railroad company were fellow servants. The same court in Railway Co. *v.* Adams, 5 N. E. 187, held that a servant could not

recover for an injury caused by the negligence of a co-servant in the same line of employment, although of a superior grade, unless the negligent servant occupies the place of a vice principal as to the injured servant. The cases cited by the respective counsel in this case, including the cases just noticed, we think justify the following conclusion: Where two switching crews are in the employ of the same railway company, subject to the control and direction of the same yard master, no member of either of said crews having any right of control or direction over any member of the other crew, both crews simultaneously engaged in switching the same cars from one part to another of the same switch yard, then each member of one crew is the fellow servant of each member of the other crew, although the foreman of each crew may sustain the relation of vice principal to the members of his own crew; and this is because, to paraphrase the language of IRVINE, C., in Railway Co. *v.* Erickson, 41 Neb. 1, 59 N. W. 347, the two crews and the members thereof are consociated in the same department of duty or line of employment.

An analysis of the instruction under consideration shows that the district court reached the conclusion that Duncan and Lyons were not fellow servants, because the court was of opinion that Duncan had been delegated by his master to control and direct a certain line or department of its business, and therefore Duncan represented the railway company and his negligence was its negligence. But this is a mistake. There is no dispute as to the facts; and the uncontradicted evidence is that Duncan and Lyons were both in the employ of the same master, subject to the orders and directions of the same yard master, neither one having any right of control or direction of the other. They were not engaged in a separate line of the company's service. They were both engaged in the same switch yard. They were both handling the same cars. They were associated together in the same department of the company's service, and transacting identically the same business. The doctrine announced in this instruction would make a switch tender in a switch yard a vice principal as to a fellow switchman riding a car from the main line to a side track. It would make a brakeman on a car whose duty it was to set a brake a vice principal to his fellow brakeman about to couple the car to another.

The theory of the district court was that, because it was Duncan's business to switch cars from the south end

of the switch yard towards the north end, and there deliver them to the north switching crew, he was therefore engaged in a separate department or line of the company's service from that of the members of the north switching crew, and therefore he was performing a duty personal to the master and represented him. But Duncan was not performing a duty which the law required the master to perform. He was not engaged in a separate and distinct department of the company's service from the members of the north crew. As to the members of the north crew, he was not a vice principal. Had he been, the instruction would have been correct. The conclusion we have reached in this case does not conflict with any decision of this court. Smith *v.* Railroad Co., 15 Neb. 583, 19 N. W. 638; Railway Co. *v.* Lundstrom, 16 Neb. 254, 20 N. W. 198; Railroad Co. *v.* Crockett, 19 Neb. 138, 26 N. W. 921; Railway Co. *v.* Krayenbuhl, 48 Neb. 553, 67 N. W. 447; Railway Co. *v.* Doyle, 50 Neb. 555, 70 N. W. 43,—were all cases in which the master was held liable for the injury to one servant which resulted from the negligence of a co-servant. But in these cases, and each of them, the offending servant sustained to the injured one the relation of vice principal, and was invested with the right of control and direction, not only of the work in hand, but of the injured servant. Railway Co. *v.* Erickson, 41 Neb. 1, 59 N. W. 347, was a case in which the railway company was held liable for an injury which a track hand, standing by the side of the road, received from being struck by a lump of coal which fell from the tender of a rapidly passing engine, and the company was held liable. But the decision rests upon the principle that the employees of the company engaged in the business of loading the engine tenders with coal were engaged in a distinct and separate department of the company's service from the department to which the injured section hand belonged; that the two servants, though in the employ of the same master, were not engaged in the same department of the company's business. In Railroad Co. *v.* Kellogg (Neb.) 74 N. W. 40, the railway company was held liable for an injury which its station agent had sustained while attempting to set a defective brake on a car left at his station, the injury resulting from the negligent failure of the car inspectors of the road to discover and properly repair the defective brake. But this case rests upon the principles that it was the duty of the master to furnish brakes for its cars which were reasonably safe and

fit for the purposes for which they were intended, and that the employees whose duty it was to inspect and repair brakes were engaged in a separate and distinct department of the service from that of the station agents of the master. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

WOLF

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, June 3, 1898.*)

Injury to Employee—Extra-hazardous Work—Assumption of Risk.* —Where a servant engaged in tearing down a wall of stone and mortar by the undermining process (that is, by first removing the stone from the bottom of the wall) is injured, the doctrine of the assumption of risks, laid down in what are known as the "Gravel-Pit Cases," does not apply. It cannot be held, as a matter of law, that such a servant assumes the risks and dangers incident to the employment.

Same—Another Action Pending—Effect of.—Recovery in an action will not be defeated by the fact that another suit to recover on the same cause of action has been instituted, with the same plaintiff and the same defendant, when it is alleged in the reply, established by the evidence, and specially found by the jury that the suit last mentioned was commenced without plaintiff's authority. He is not obliged to dismiss the unauthorized action, as a preliminary to his right to recover in the one actually authorized and prosecuted by him.

(Syllabus by the Court.)

APPEAL by defendant from Hennepin county district court. *Affirmed.*

W. E. Dodge, for appellant.
F. D. Larrabee, for respondent.

COLLINS, J. While plaintiff was at work for defendant as a common laborer, engaged with others in tearing down and

*See note at end of case.

removing a stone wall from underneath a building, he received injuries, and, to recover damages therefor, instituted this action. The jury found in his favor, and defendant appeals from an order denying its motion for a new trial.

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One of the principal points made by counsel for defendant is that the evidence was insufficient to support the verdict; and, to properly discuss this question, the facts on which the finding in plaintiff's favor was based must be quite fully stated. Plaintiff was inexperienced in this particular kind of work, and during the first day was kept at shoveling. The wall or underpinning was about 60 feet long, at least 5 feet high, and 18 inches thick, built of common limestone laid in mortar. A few feet at one end had been torn down, and after excavating the earth on one side of the wall for a few feet laterally, so as to get at the foundation stones, plaintiff and another man were directed by the foreman to tear down a section of about 4 feet of the wall itself, commencing at the bottom layers of stone, and removing upward,—a common way of doing this kind of work, where the wall is not so high as to make the method very hazardous, by reason of the danger attendant upon the falling of a large quantity of material from overhead. The plaintiff held a chisel against the mortar seams, and the other man struck the head of this instrument with a hammer, thus loosening the layers of stone; and, with a little prying, the stones fell to the ground of their own weight. After one layer, at least, of stone had been removed in this manner, and while the men were endeavoring to take out another, that part of the wall immediately above the space created by the removal suddenly collapsed and fell to the ground, causing the injuries complained of. The estimated weight of the part which then fell was seven or eight hundred pounds. The testimony tended to show that, just prior to commencing the work of removing stone, plaintiff used his pick for the purpose of ascertaining the stability of the wall at that point, and was told by the foreman to go ahead,—that the frost (it was in early spring) would hold it, and that the wall was safe.

1. Upon this state of facts, defendant's counsel contends that, when injured, plaintiff was engaged in work not extrahazardous nor attended with unusual dangers, but was in such a common and ordinary occupation as every laborer engages in daily, and always attending such employment, and, further that, subject to the rule of the assumption of the risks

Injury to Employes—Extrahazardous Work—Assumption of Risk.

under the evidence, plaintiff has been brought directly within the rules of law laid down in what are known as the "Gravel-Pit Cases,"—notably, Pederson *v.* City of Rushford, 41 Minn. 289, 42 N. W. 1063. We cannot agree with counsel. In the case just mentioned it was said that a master is not bound to provide safe employment for his servant, nor to do his work in a safe way, provided the servant, when he enters on the work, knows the risks and dangers incident to that kind of work, and that way of doing it; that no skill or science is required to inform one that the upper part of a bank of earth will come down when the lower part upon which it rests is removed; and that, when the servant knows the dangers, he takes upon himself the risks by accepting the employment, and when the dangers are not concealed, but are open to the senses, he is ordinarily bound to know them. Applying these rules, it was necessarily held that as the ordinarily intelligent man must know the effect and operation of the laws of gravitation, and of undermining a bank of earth, he assumes all of the risks when so at work, and could not recover where the earth fell, of its own weight, upon him. But it was not expected that these rules would be pertinent in all cases where the casualty is caused by the operation of the laws of gravitation. It is obvious that the man of ordinary intelligence would know that, if a sufficient quantity of the lower part of a wall composed of stone and mortar was removed, the portion above would fall of its own weight, its support being taken away. But a wall of stone and mortar has lateral strength not found in a bank of earth, for its constituent parts are joined and connected laterally as well as in other directions. Remove a part of the foundation of a wall, and the balance above may be sustained in place, in some degree, through its adherence to the stone and mortar upon the sides; but not so with earth. This appeared from the evidence in this case, for several of the expert witnesses stated that usually the wall above hung after removing the lower stones, and had to be broken off by means of wedges inserted at the top. So that while every ordinarily intelligent man must be held to know that earth will fall, if undermined, he might not readily understand how far he could go with comparative safety when removing foundation stones or the lower layers of a stone wall of the height of the one now under consideration. This case, on the facts, is not one where we can say that no skill or science was required in order to understand the risks incident to the employment,

nor that the exposure to the dangers was open to the senses of the ordinary man. Nor can it be held, as a matter of law, that a servant engaged in this kind of work assumes the risk incident to the employment. On the facts, this case is easily distinguishable from the Gravel-Pit Cases, and the principles which control such facts have been repeatedly stated. See Bennett *v.* Insurance Co., 39 Minn. 254, 39 N. W. 488, and cases cited.

2. The answer herein alleged that, prior to the commencement of this action, plaintiff had instituted another, in Ramsey county, in this state, to recover for the identical injuries, and in which the issues were the same, which action it was alleged, in abatement, was still pending. The reply admitted that such an action had been brought, and was still pending, but averred that all of the proceedings therein were taken without plaintiff's authority, and against his will. At the trial a written instrument executed by plaintiff, and delivered to the attorney at law who brought the first action, was produced in evidence, whereupon plaintiff introduced testimony tending to show that this writing was obtained by fraud practiced upon him. The jury found specially that the pending action set up in the answer was commenced without plaintiff's authority. And it is not urged that this special verdict was not supported by the evidence. The claim made by defendant's counsel on this feature of the case is that, under the decisions (Page *v.* Mitchell, 37 Minn. 368, 34 N. W. 896, and Nichols *v.* Bank, 45 Minn. 102, 47 N. W. 462), it was required of plaintiff that he cause the first suit to be dismissed, and set up such dismissal in his reply, or that it was essential, at least, that the first be actually dismissed when the one at bar was tried, and that the admitted pendency of the first at the time the second was tried absolutely prohibited a recovery in the latter. The rule, as settled in this jurisdiction, is correctly stated by counsel, but it has no application to a case where the action pleaded in abatement has been instituted without authority. The special verdict amounted to a finding that no action had been commenced by plaintiff, and, as a consequence, that none was pending. It was not plaintiff's action, but one brought in his name, and without his authority, and over which he was not bound to assume control. He had a right to repudiate it by declining to take any part in either its prosecution or its dismissal. He was not bound by the unauthorized com-

Same—Another Action Pending—Effect of.

mencement of an action in his behalf against defendant, and, if thereafter bound, it would be because he had adopted the act, and the fact created an estoppel. The parties were the same in both actions, and the issue made in respect to the lack of authority to bring the first could be more easily and fairly litigated on the actual trial of the second than it could be on a motion to dismiss, necessarily on affidavits, made in the first.

3. The written instrument or contract hereinbefore mentioned, and referred to in the sixth assigment of error, is not before us, and therefore the assignment is passed without consideration.

4. Other assignments need no special mention. Judgment affirmed.

CANTY, J. I concur in the first part of the foregoing opinion, on the principles laid down in my concurring and dissenting opinions in the series of cases commencing with Blomquist *v.* Railway Co., 60 Minn. 426, 62 N. W. 818. In the latter case I laid down the following proposition: "When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able to care for himself as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice principal, but he and the inferior servant are fellow servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and, from his grade or position, cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant." This applies here. Whether such conditions existed as would constitute the foreman a vice principal was, on the evidence in this case, a question for the jury. While this wall may have been taken down in the usual way of taking down such walls, still it is not a kind of work that is common or frequent, common laborers would not ordinarily be familiar with its dangers, and it required some considerable degree of skill to determine whether the work here in question was being done in a reasonably safe manner. The Gravel-Pit Cases are not parallel. It requires less skill to determine whether it is safe to work under a bank of earth or gravel,

and, besides, common laborers usually do very much more of the latter kind of work, are ordinarily much more familiar with its dangers, and better able to take care of themselves when employed in such work. They are usually about as well able to look out for their own safety, when employed in such work, as the foreman is to look out for them. I concur, also, in the last part of the opinion.

NOTE.

Assumption of Risk from Falling Object.—In Nourie *v.* Theobald (N. H.), 41 Atl. Rep. 182, it was held that one who was employed in tearing down a building must be held to have assumed the risk of injury from falling timbers while so engaged.

LAKE ERIE & W. R. CO.

v.

MORRISSEY.

(*Supreme Court of Illinois, Dec. 21, 1898.*)

Direction of Verdict—Question for Jury.—Where there is evidence fairly tending to sustain the issues in behalf of plaintiff, it is proper to refuse to direct for defendant.

Switching Tracks—Duty to Ballast.*—It is the duty of a railroad company to have its track ballasted, within switching limits, with cinders, gravel or other substance, up level with the ties, and level with the bottom of the rail, if ballasting to such extent is necessary to make the track reasonably safe to employees engaged in coupling cars.

Same—Same—Assumption of Risk.—Where an employee is not chargeable with notice that the company has failed to perform such duty at a certain point, he does not assume the extra risk pertaining to an attempt to couple cars at such point, resulting from such failure.

Instructions.—It was proper to modify defendant's requested instructions in regard to the duty of ballasting switching tracks so as to make them applicable to the point at issue.

*See note at end of case.

Lake Erie & W. R. Co. *v.* Morrissey

APPEAL by defendant from Third district appellate court. *Affirmed.*

This was an action brought by Michael M. Morrissey in the circuit court of McLean county, against the Lake Erie & Western Railroad Company, to recover damages for a personal injury suffered by him while in the service of the company as a conductor of a freight train, and while attempting to couple, in the nighttime, two Empire Line cars, at East Lynn, a small village on the line of the road. The declaration contains but one count, and the material part is as follows: "And the plaintiff avers that it was the duty of the defendant to keep and maintain that portion of its main tracks in the vicinity of said side tracks as aforesaid, which it was necessary for the plaintiff to pass over in order to do switching and coupling and uncoupling of cars, in a safe and proper condition, so as not to expose the plaintiff or the servants of said company to any unnecessary danger or liability of accident; and it was then and there the duty of the defendant to have filled in the space between the ties, and underneath the same, of its said railroad track, with cinders or other substance, to fill the same up level with the top of the ties to the bottom of the rail of the said defendant's track that was laid on said ties, so that the plaintiff and the servants of the said company whose duty it was to couple and uncouple the cars and do switching, in standing and walking on said track in order to couple its said cars, the plaintiff would not be exposed to unnecessary danger or liability to catch his foot underneath the rails of said ties, or stumble or trip over the same. And plaintiff avers that the said defendant, not regarding its duty in that behalf, carelessly and negligently permitted that portion of its main track in the vicinity of the said switch and side track, at the village of East Lynn, and in the switch yard there, to remain in unsafe repair and condition, and then and there carelessly and negligently permitted the same to be and remain out of repair, and negligently and carelessly permitted certain ties to remain above the surface of the ground, and negligently and carelessly permitted the north rail of the track of the said defendant's railroad on the main track, as aforesaid, to remain above the ground, and failed to have the ground between the ties and the bottom of the rail filled up so that plaintiff would not be exposed to danger or accident in attending to his duties as such conductor while in and about coupling and

Case Stated.

uncoupling cars passing along and over the said track, which he was obliged to do while attending to his duties in coupling and switching the said cars. And plaintiff avers that while standing and walking upon the said portion of the said main track, which he was obliged to do in order to make a coupling between the cars on the head end and the cars in the rear end of defendant's train, in the line of his employment pursuant to his duty, not knowing the defective condition of the said track as aforesaid, in the nighttime, was then and there exposed to unnecessary danger and liability to accident; and then and there, while so engaged in making a coupling between the defendant's cars, as aforesaid, standing and walking upon the said portion of the main track, using due care and caution for his own personal safety in the line of his duty, his left foot became and was caught and fastened underneath the rail of the said defendant's track, and against one of the ties of the same, and he then and there was unable to extricate the same; and the plaintiff was then and there thrown with great force and violence, and by the momentum of the cars he was so engaged in coupling, necessarily and unavoidably fell to and upon the north rail of said main track; and divers wheels of one of the defendant's cars, which plaintiff was then and there engaged in coupling, then and there ran and passed over his left leg, whereby his left leg was crushed so that it became and was necessary to amputate the same above the knee," etc. The defendant demurred to the declaration, which demurrer was overruled, and a plea of general issue was filed. A trial was had before a jury, resulting in a judgment in favor of the plaintiff. The defendant appealed from the judgment of the circuit court to the appellate court for the Third district, where the judgment of the circuit court was affirmed; and appellant has appealed to this court, and asks for the reversal of the judgment of the appellate court.

Tipton & Tipton and *John B. Cockrum*, for appellant.
J. E. Pollock and *FitzHenry & Pollock*, for appellee.

CRAIG, J. (after stating the facts). Appellee, at the time of the injury, was 30 years of age, and was married. He had been railroading about 12 years, as brakeman, baggageman, and conductor. He had worked on the Chicago & Alton road about 11 years. He commenced work for appellant on the 6th of April, 1897, as conductor of a gravel train, and he afterwards had a run between Rankin and Peoria. East

Lynn is a regular station for receiving passengers and freight on the division east of Rankin. The night of August 14, 1897, when the accident occurred, appellee was sent east as conductor, in charge of the appellant's freight train, on the Third, or Eastern Division, and he had never made any trip prior to this one over this Eastern Division. He started from Tipton, Ind., with a train of 43 or 44 cars; and when the train reached East Lynn, about 100 miles west from Tipton, it was about 1:30 o'clock at night. It was necessary to do some switching at this station, by putting off some cars. Two cars were shoved on the north, or "business," track, as it was called. Then they pushed two more on the main track, and shoved a couple more on the business track. Under the rules of the road, it was appellee's duty to couple and uncouple cars. Four cars were cut off and run down on the main track, and appellee set the brakes on them, when he noticed the other cars coming down the main track, pushed by the engine; and he went over and set the coupling pin on the two cars then standing on the main track. It appears that the two Empire Line cars he was attempting to couple have a deck on the end, and on this are iron buffers. The drawbar is below, and they are more difficult to couple than ordinary cars, and require the entire attention of the person making the coupling. When appellee undertook to make the coupling, he had hold of the handhold with his right hand, and reached down and placed the link in the drawbar. He then raised up and reached over to shove the pin down when the cars came together. The cars pushed the two cars that had been standing about half a car length, and appellee was compelled to walk along with them, and it was while going that distance that he was injured. He made two or three steps, and the cars parted, and, when they parted, he tried to step out from the track. He stepped out with his right foot, but his left foot caught, the toe of his shoe going under the north rail of appellant's track; and he was unable to extricate it, and was thrown down by the cars he was attempting to couple, and fell upon the north rail of the main track, and his left leg was run over, and was so injured that it was necessary to amputate it. It appears that it was appellee's first trip through East Lynn in charge of a train, and he knew nothing about the condition of the track, except what he might have learned in the short time he stood there coupling the cars.

One of the grounds urged by appellant for reversal is that

the court, at the close of the evidence and before the argument of counsel, refused to instruct the jury to find the issues for the defendant. Where there is evidence fairly tending to sustain the issues in behalf of the plaintiff, the weight to be given to the evidence must be submitted to the jury, and it is the duty of the court to refuse an instruction like the one asked. An examination of the evidence as to whether there was evidence tending to support the cause of action as set out in plaintiff's declaration satisfies us that the trial court did not err in refusing to take the case from the jury.

Direction of Verdict—Question for Jury.

Did the court err in giving instructions on the part of appellee? Only 4 instructions were asked or given on the part of appellee, while 36 were given on the part of appellant. Appellant argues that it is not liable if its road was ballasted as roadbeds are usually ballasted which have adopted the system appellant adopted. The question made by the declaration was not whether the "crown" or "box" system of ballasting a railroad was the best, but whether, under the declaration, the appellant "carelessly and negligently permitted its main track in the vicinity of the switch and side track to remain out of repair and in unsafe condition, and carelessly permitted certain ties to remain above the surface of the ground, and carelessly and negligently permitted the north track to remain above ground, and failed to have the ground between the ties and the bottom of the rail filled up so that plaintiff would not be exposed to danger of accident in attending to his duties as such conductor while in and about coupling and uncoupling cars passing upon and over said track," etc. The third instruction for the plaintiff told the jury that it was the duty of the defendant to have its track ballasted at the village of East Lynn, within switching limits, with cinders, gravel, or other substance up level with the ties, and level with the bottom of the rail, if ballasting to that extent was necessary to make such railroad track reasonably safe to employees in coupling cars; and that if they believed, from the evidence, that the track was not so ballasted at the point of the alleged injury, but, on the contrary, was ballasted so that the gravel was lower than the rail at said point, and that, by reason of such gravel being lower than the rail, the plaintiff, while exercising ordinary care for his own safety, caught his foot underneath the rail, and was unable to extricate the same, and in consequence thereof was injured, then

Switching Tracks—Duty to Ballast.

in such case they should find for the plaintiff, and assess his damages at what they believed, from the evidence, he had sustained.

In Railroad Co. *v.* Sanders, 166 Ill. 270, 46 N. E. 799, which was a case involving the same principle in effect, this court said (page 278, 166 Ill., and page 802, 46 N. E.): "The law does not require a railroad company to furnish machinery, tracks, and switches for their employees which are of the best character and are absolutely safe; but the duty imposed is to use reasonable and ordinary care and diligence in providing safe machinery, tracks, and switches for the use of those engaged in its service. Railroad Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55. But this rule, as the evidence tends to show, was not observed. The evidence seems to show that, as a general rule, railroad companies at stations within switching limits have their tracks filled up to the level of the ties, so that brakemen may walk over the ties in coupling cars without stumbling or falling. If this precaution had been observed, it is apparent appellee's foot, in attempting to couple the cars in question, would not have been caught under the ties, and he would not have stepped into the cattle guard, and received the injury." What was said in the Sanders Case is applicable here. The evidence in this case shows that many of the railroads,—the Chicago & Alton, the Chicago & Northwestern, the Chicago, Burlington & Quincy, and several other roads,—on the main track, in the switch yards, and at terminals, grade up their tracks even with the top of the ties to make them safe for brakemen coupling and uncoupling cars. The law requires a railroad company to exercise reasonable and ordinary care and diligence in furnishing safe tracks for its employees. If it is necessary for the safety of its employees in the larger towns and terminals, it is equally necessary in the smaller places where switching is necessary to be done. Moreover, the principle announced in appellee's third instruction is recognized in appellant's seventeenth instruction, which reads as follows: "The court instructs the jury that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance to and on a level with the bottom of the rail, unless the same is necessary to make the same reasonably safe. If the jury believe, from the evidence, that the roadbed and track at the point in question was reasonably

safe for the employees in the management of defendant's trains, the jury will find the defendant not guilty." This instruction, while it asserts that the law does not require railroad companies to ballast their roads, within switch yards or elsewhere, with cinders or other substance, to and on a level with the bottom of the rail, admits it is required if necessary to make the same reasonably safe, which is in harmony with appellee's third instruction. The law required the railroad company to furnish a reasonably safe track inside the switching limits, where switching was required to be done; and the plaintiff, in the absence of knowledge to the contrary, as we said in the Sanders Case, *supra*, had the right to presume that the railroad company had discharged its duty in this regard. The evidence shows that the plaintiff was not familiar with the road at the place where the injury occurred, having never been over this Eastern Division prior to this trip, and that he did not know anything about the condition of the track before that; that it was in the nighttime, and he was not standing there more than a minute before the cars were pushed up by the engine to be coupled. These instructions, both on the part of appellant and appellee, are in substance to the same effect, and agree as to the law, and are in accord with the views of this court as expressed in Railroad Co. *v.* Sanders, *supra*, and therefore could not have misled the jury to the prejudice of appellant. Railroad Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021.

Appellant insists the court erred in modifying appellant's twenty-sixth instruction, by inserting the words "and known to plaintiff." The instruction is as follows: "The court instructs the jury that if they believe, from the evidence, that the plaintiff was an employee of the defendant, and, as such, was conductor of and in charge of the train in question, and if you further believe, from the evidence, the defendant's roadbed and track at the point in question, as constructed, was reasonably safe for its employees engaged in the movement of the defendant's trains and the operation of its road, and that the condition of the road at the place of injury was open and visible and known to plaintiff, then the law is that the plaintiff assumed the ordinary risks incident to such employment, and that the injury incident to the coupling of cars was one of the risks assumed by the plaintiff under that employment, and for which he cannot recover." The modification was proper, under the evidence in the case. Appellee testified this was his first trip

Same—Same—Assumption of Risk.

over this division; that he knew nothing about the condition of the track where the injury occurred; that it was in the nighttime, and he had no opportunity to see it except the moment he was attempting to couple the cars; and there is nothing in the record contradicting appellee. In Railroad Co. *v.* Hines, *supra*, this court said (page 169, 132 Ill., and page 1022, 23 N. E.): "The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master; and, while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. Shear. & R. Neg. (2d Ed.) § 95; Bish. Noncont. Law, § 678; Porter *v.* Railroad Co., 60 Mo. 160. And, necessarily, much more is the servant entitled to assume that his master has furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where, as in the present instance, the performance of his duties requires constancy of attention to other matters. A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give much attention to the ties, switch bars, etc., over which he may, from time to time, have to pass."

Appellant objects to the modification of its thirtieth and thirty-first instructions. They are as follows: (30) "The court instructs the jury that if they believe, from the evidence, that it is customary for well-managed railroad companies to ballast their tracks with gravel, making a crown in the center, sloping off each way towards the rails, leaving an inch or an inch and a half of space under the rails for water to escape, and that such method of ballasting is reasonably safe for employees, and if the jury believe, from the evidence, that the defendant's road at the point in question was so ballasted, then the jury will find the defendant not guilty." (31) "The court instructs the jury that if they believe, from the evidence, that defendant's road was ballasted with gravel at the point in question, crowned in the middle, sloping to the tracks, leaving an inch or an inch and a half of space under the rails for the water to escape, and that this mode of ballasting is in common use by well-managed railroads in this country, and that such ballasting is reasonably safe for employees, then the defendant is not lia-

Instructions.

ble." Under the allegation in the declaration, as before shown, the modification, "and that such method of ballasting is reasonably safe for employees," was proper, and not error. The modification of appellant's sixth, sixteenth, twentieth, twenty-first, twenty-third, and twenty-fourth instructions was proper for the same reason, and it is unnecessary to refer to each one separately. The instructions, taken together as a series, fully presented the law as applicable to the case under the pleadings; and, perceiving no serious error, the judgment of the appellate court will be affirmed. Judgment affirmed.

NOTE.

Duty of Company to Ballast Yard Tracks.—In Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222, a night brakeman in the company's yard at Beaumont, while coupling cars, caught his foot between the ties of an unballasted track and was killed. It was held that the company was negligent in not having the track properly ballasted.

In St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, where a brakeman was killed by the unballasted condition of the track, the court, by HEMINGWAY, J., said: "If the track had been in the same condition where the injury occurred as in other parts of the yard, we think that knowledge of it should be charged to the deceased; and if he were chargeable with such knowledge, plaintiff could not recover. * * * But as the injury occurred where the exposure of the ties was greater than in other places, and where the risk was correspondingly increased, we cannot say that the deceased knew of the extra hazard to which he was there exposed, or that he assumed the risk arising from it." See also San Antonio, etc., R. Co. *v.* Parr, (Tex. Civ. App. 1894) 26 S. W. Rep. 861.

In Bonner *v.* Hickey, (Tex. Civ. App. 1893) 23 S. W. Rep. 85, the plaintiff, a brakeman, was injured while coupling cars in the defendant's yard at Houston. The evidence showed that the track where the accident occurred, known as the "cotton track," was poorly ballasted and overgrown with grass, and that the plaintiff, who was ignorant of its condition, was injured by stepping between the ties and falling. It was held that the defendant was negligent.

But in Williams *v.* St. Louis, etc., R. Co., 119 Mo. 316, where a repair track was overgrown with grass, and the plaintiff, a brakeman, had coupled cars there many times before without objection, he was held to have assumed the risk.

It is not negligence for a railroad company to have its track in a rough and unballasted condition where the same is being repaired,

and is using reasonable diligence in putting it in condition. An unnecessary delay in so doing would amount to negligence. Cleveland, etc., R. Co. *v.* Slone, 11 Ind. App. 401.

And see Vautrain *v.* St. Louis, etc., R. Co., 8 Mo. App. 538, where the section man left a hole in the track after making some repairs, and a brakeman was injured.

LOUISVILLE & N. R. CO.

v.

VESTAL.

(*Court of Appeals of Kentucky, Jan. 26, 1899.*)

Injury to Brakeman—Coupling Cars in Yard—Cinders on Track—Assumption of Risk.*—Where a brakeman's injury is the result of stepping upon a clinker while coupling cars at night in defendant's yard, it cannot be held as matter of law that he had assumed the risk, although he knew that the ash boxes of the engines were emptied on the tracks in such yard, and sometimes remained there for some hours, he having had no reasonable means of knowing the precise danger to which he was exposed, his duties in such yard requiring him to move rapidly.

APPEAL by defendant from Kenton county circuit court. *Affirmed.*

J. W. Bryan and *H. W. Bruce*, for appellant.
W. S. Pryor and *William Goebel*, for appellee.

PAYNTER, J. The appellee was employed by the appellant as switchman in its yards at Milldale, and on the night of December 13, 1894, while engaged at his work, in attempting to couple two freight cars, his hand was caught between the bumpers, and so badly mangled that amputation was rendered necessary. The evidence of the appellee conduces to prove that two cars were "kicked" back to be coupled with a stationary one, and as they moved back at a safe rate of speed appellee jumped from them, moved ahead, and, after seeing the drawheads were safe, attempted to place himself in proper position to make the coupling, and to do so was compelled to place one foot between the rails of the track upon

*See note at end of case.

which the cars were approaching. In doing this he trod upon a clinker about one foot long, and six inches thick, at the side of an ash pile, which had been placed there by emptying ashes from an engine; and it turned, threw him, and in his effort to protect himself from falling under the cars he caught the bumper on one of the cars as they came together, resulting in the injury described. The accident occurred in the railway yards, where numerous trains were broken and made up, and necessarily much switching was done. The appellee had been engaged in the business at that place for a considerable time, and knew that the ash boxes of the engines were emptied on the tracks, and sometimes remained there for some hours; but he knew nothing about the pile of ashes and clinkers being at the place stated, until after his injury occurred. The principal question in this case is, if the appellee trod upon the clinker, as claimed, and the injury resulted therefrom, was it one of the risks of the business which he assumed? On behalf of the appellant it is insisted the affirmative of the proposition is true, and therefore the court should have told the jury that the law is that no recovery could be had in the case, for the reason that it was an assumed risk. The doctrine in Kentucky is, where the employee labors with machinery that he knows is defective and dangerous, or could, by the exercise of ordinary care, know the danger attending its use, the employer is not liable for the injury resulting from the carelessness or negligence of providing defective or dangerous machinery, unless he relies upon the employer's promise to repair. In stating the rule the court has not had an occasion to state the well-recognized exception to it. It said in Bogenschutz *v.* Smith, 84 Ky. 336, 1 S. W. 578: "The master must use ordinary care in providing proper and safe premises as well as proper machinery and material for the servant; but if, from any cause, it be not so, and the latter is fully aware of it, and, without complaint or assurance to him from the master that it shall be remedied, he voluntarily continues the use of them, then he waives his right, in case of injury, to hold the master responsible, and is without remedy." It is likewise said in that case (page 339, 84 Ky., and page 580, 1 S. W.): "We do not mean to decide that there may not be cases where the servant has a right to rely upon the judgment of the master as to the safety of the premises or material to be used, or that the servant is bound to inform himself as to them. Thus it is, in general, no part of the duty of a brakeman to inspect

the track of a railway, or to know that it has been safely constructed. The master may have superior means of knowledge, and the circumstance may authorize the servant to rely on him because of want of equal opportunity. The servant may be ignorant without fault, while the master is negligently so. The law to be applied to a case must, therefore, depend upon the facts shown." There is a qualification of the rule that he who engages in the employment of another for the performance of specified duties, and serves for compensation, takes upon himself the ordinary risks and perils incident to the performance of such services, which exceptions rest upon the principles of justice and public policy, one of which is the obligation of the master not to expose the servant, in the performance of his labor, to perils against which he may be guarded by proper diligence upon the part of the master; and to avoid such perils the master is bound to observe the care which prudence and the exigencies of the situation require in furnishing the servant with machinery or other instrumentalities adequately safe for use by the latter. Public policy requires the master, in the selection of the means and agency required in the conduct of his business, to do so with proper care, and, while the servant risks the perils which ordinarily attend or are incident to the business in which he engages, the master's negligence in such selection is not one usually or necessarily attendant upon the business. He is not presumed to risk, in contemplation of the law, the negligence of the master. This is obviously true, as the servant has nothing to do with the purchase or maintenance of the instrumentalities provided by the master for the conduct of his business. A brakeman has nothing to do in the matter of providing the cars which his duty requires him to couple; neither has he anything to do with the construction of its tracks, roadbed, or their maintenance. It is the duty of the railroad company to keep its tracks in a reasonably safe condition, and that duty is not performed unless it keeps them free from obstructions which might hinder a brakeman in the performance of his duty, so as to render hazardous its performance. The accident occurred at a place used for the purpose of making up trains. The duties of a brakeman require him to move rapidly in separating and uniting cars, and to do which it is necessary for him to place one of his feet on the track, and his body over it. This service was to be performed at night, and with such rapidity that it rendered it impossible for the brakeman to tell with accuracy

and certainty the condition of the coupling attachments and the track at the particular places where the couplings were to be made. This and other courts have held that when brakemen, while in the discharge of their duties on the top of moving trains, were injured by bridges, although they knew their location and the danger of passing over them, there could be a recovery. Railway Co. *v.* Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12; Wallace *v.* Railroad Co., 138 N. Y. 302, 33 N. E. 1069. The courts in those cases were of the opinion that the brakeman did not assume the risk incident to the discharge of their duties while passing over the bridges, nor did the courts believe they were guilty of contributory negligence, notwithstanding they knew of the location of the bridges, and the danger of passing over them. Would it be a sound principle to hold, because part of the cars of a railroad compay had defective coupling attachments, known to a brakeman, that he, by reason of such knowledge, assumed all risk attending the coupling of cars? Under such a rule a brakeman could not recover damages for an injury received in coupling cars with the defective attachments, and by reason thereof, although he did not at the time know of the defect in the coupling attachments of the particular cars, but used all proper care under the situation to discover it, and avoid the injury. Such a principle has not for its foundation either reason or justice. Would it be reasonable to hold that, as such brakeman remained in the service of the company, he was required to know every car with a defective coupling attachment, and avoid injury thereby, and that, notwithstanding he used all possible care to discover such defects and avoid injury, he had the misfortune to lose a hand by reason of such defect, he could not recover, because it was a risk which he had assumed? Such an application of the doctrine of assumed risk would lack the quality of humanity, and would be disregardful of public policy, as it would deny redress to one who suffered in consequence of another's wrongful act, and a refusal to punish the wrongdoer in the public interest; that being the only method provided to deter the master from a repetition of the wrong. If the contention of the appellant be correct, then the appellee was bound to know the exact location of every clinker in the yard, and avoid being injured by it. He was required to know the exact location of the clinker in question, although, as a matter of fact, he did not know it was in existence; and the jury was authorized from the evidence to reach the

conclusion that by ordinary care, under the situation, he might not have discovered it.

Considering the circumstances under which the injury was received, we cannot, as matter of law, say the appellee assumed the risk. He had no reasonable means of knowing the precise danger to which he was exposed, and the mere fact that he might have surmised there was a possibility of danger will not justify the court to take the case from the jury. Hulehan *v.* Railroad Co., 68 Wis. 528, 32 N. W. 529; Kennedy *v.* Railway Co. (Wis.) 66 N. W. 1137. The fact that the appellee knew the servants of the appellant were in the habit of dumping ashes on the track would not necessarily cause a reasonably prudent man to believe he was exposing himself to the danger of losing his life or suffering bodily harm. We are of the opinion that the true rule is that a servant can recover for any injury suffered from defects due to the master's fault of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similiar conditions, have continued in the same work under the same risk, but not otherwise. Shear. & R. Neg. (5th Ed.) § 211. Counsel for appellant, in support of his position, cites the case of Hughes *v.* Railroad Co., 27 Minn. 137, 6 N. W. 553. The facts of that case are similiar to those of the case at bar. The court held there could be no recovery, but we are not inclined to follow the doctrine enunciated in that case. In Snow *v.* Railroad Co., 8 Allen, 446, it appeared that the plaintiff was injured by getting his foot in a hole in the roadbed of the defendant; that it existed for two months, and the plaintiff was acquainted with it for that length of time, and complained of it to the repairer of the tracks of the defendant's road. The court said: "The place where the accident happened was intended to be used for the purpose of making up trains. It was necessary for the person whose duty it was to unshackle the cars, or to fasten them together, to pass and repass over the space covered with plank between the tracks frequently, and with rapidity, and with his attention in great degree diverted from the surface over which he passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. The existence of such a defect as the evidence disclosed at the trial, being of a nature to obstruct the plaintiff in passing safely and rapidly over and between the tracks, and to hinder him in the performance of the service in which he was en-

gaged, tended very strongly to show that the defendants had committed a breach of the implied obligation which rested upon them to provide a suitable place in which the plaintiff could perform his duty safely, in the exercise of due and reasonable care, and without incurring a risk which did not come within the scope of his employment. The omission of the defendants was analogous to a failure on their part to have and maintain safe and suitable tracks, switches, or turnouts, or to construct and keep in repair staunch and sufficient bridges. For such failure or omission they would be clearly liable in damages to a person in their employment who might be injured thereby, according to the principles and authorities already referred to." In Kane *v.* Railway Co., 128 U. S. 94, 9 Sup. Ct. 16, the court said: "It is undoubtedly the law that an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them, if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. * * * But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion." In the case of Wallace *v.* Railroad Co., 138 N. Y. 302, 33 N. E. 1069, the brakeman was injured by being hit by a bridge while in the discharge of his duties on the top of the moving train. He knew where the bridge was. The court said: "We do not think that one thus situated can, as matter of law, be charged with negligence because he did not take notice of the fact that he was approaching the bridge, and thus know that he was in a place of danger. He was in a place where there was danger that the train might break in two, and he was intent upon the discharge of his duty. It cannot be said that a brakeman is, as matter of law, careless, because he does not bear constantly in mind the precise location where the train is and where every bridge is." It is said in 1 Shear. & R. Neg. (5th Ed.) § 209a: "A servant who, with actual or constructive notice of a defect, due to the master's fault, and of the danger to which he is exposed thereby, and either fully comprehending the risk, or by his own fault failing to do so, 'voluntarily takes his chance,' and continues in work

which exposes him to such danger, without reasonable excuse, and without complaint or objection, where ordinary prudence would require him to refuse the risk, is held to assume the risk. This rule has been applied to cases in which a servant has suffered injuries from the employment of an incompetent or habitually negligent fellow servant, or from inadequacy in the force employed, from defects in the place of work, materials, or appliances, from the dangerous nature of the work, from unlawful speed of trains, or from failure to maintain safeguards required by law. But those cases in which it has been held, regardless of these limitations, that notice of defects or continuous negligence of the master was a bar to the action, as matter of law, are overruled and obsolete. The latest and best authorities hold that the liability of the master for risks caused by his negligence, which did not exist when the servant accepted the employment, depends upon the 'question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily, or endures it because he feels constrained to.' If he voluntarily continues work, with full notice of the risk, he assumes it, but not so if he acts under coercion." Section 211, *Id.*, reads as follows: "The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the same work under the same risk; but not otherwise. All the circumstances must be taken into account, and not merely the isolated fact of risk. * * *" Section 211a, *Id.*, reads as follows: "As already stated, it is now held by the most conservative authorities that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice after he has entered into service, unless he assumes the risk of his own free and unconstrained will. If, therefore, he continues to incur the risk of such defects under any kind of necessity or coercion, such as the threat or reasonable fear of dismissal, he does not voluntarily assume the risk, and is not, necessarily, debarred from recovery thereby. It is true that many decisions can be found to the contrary, but, now that the ultra-conservative courts of Great Britain and Massachusetts have overruled them, we may be permitted to concur with the Virginia court in condemning such decisions as founded on a 'cruel and inhuman doctrine.'" Section 212, *Id.*,

Note

reads as follows: "The test of prudence, in these cases, in analogy to that applied in ordinary cases of contributory fault, is that which a prudent servant, of the same class, using such prudence and judgment as such persons usually possess, but no more, might reasonably be expected to apply to the particular case. * * *" Section 213, *Id.*, reads as follows: "A servant is not debarred from recovery, as matter of law, by his omission to exercise, under peculiar circumstances, the same kind or degree of care which he should exercise under ordinary circumstances. * * * The mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if, for any reason, the servant forgets it, and is not in fault in forgetting it, at the precise time when he suffers thereby. In analogy to the principles already stated under the head of 'Contributory Negligence,' the servant's rights are not prejudiced by his excusable forgetfulness of, or failure to observe, a defect or danger, under the influence of sudden alarm or of an urgent necessity for speed, or if his duties are such as necessarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects, or if the light is imperfect. * * *" Other cases could be cited in support of the conclusions we have reached. Our opinion is that the court did not err in letting the case go to the jury. It was the judge of the facts, and we decline to disturb the judgment, and it is affirmed.

NOTE.

Ashes in Freight Yard—Liability of Company for Injury to Car Coupler.—A railroad company is liable for the negligence of a fireman in dumping ashes in a freight yard, and a brakeman injured by stumbling over a heap of ashes so placed can recover. Southerland *v.* Northern Pac. R. Co., 43 Fed. Rep. 646; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32. But see Costello *v.* Philadelphia, etc., R. Co., 2 Pa. Dist. Rep. 453, and Welch *v.* New York Cent., etc., R. Co., (Supreme Ct.) 17 N. Y. Supp. 342, where the ashes were recently dumped and the company could not be fixed with knowledge.

A brakeman attempted to couple cars on a side track, but because of defect in the couplings, they failed to couple, and, fearing injury when the cars came together a second time, he stepped back, but slipped on a pile of snow and was injured. It was held that the company was negligent in having thrown up a pile of snow where brakemen would be required to go to couple cars, and was liable in damages. Cregg *v.* Chicago, etc., R. Co., 91 Mich. 624.

FAY

v.

CHICAGO, ST. P., M. & O. RY. CO.

(*Supreme Court of Minnesota, May 8, 1898.*)

Injury to Employee—Accumulation of Snow in Switch Yard—Liability of Master.—Reasonable care does not require railroad companies to remove all the snow from their yards, where cars are switched and trains made up. If they keep the surface of the snow practically level, and do not allow it to accumulate above the level of the rails, or in dangerous ridges or hummocks, or to form dangerous holes, they cannot be charged with negligence (at least, unless under very special and peculiar circumstances) for not removing the snow, or covering it with ashes or cinders.

Same—Employee Chargeable with Notice.—*Held*, also, that in this case the deceased must, or, in the exercise of ordinary care, should, have known of the slippery condition of the surface of the snow, and the risks incident to such condition.

(Syllabus by the Court.)

APPEAL by plaintiff from Watonwan county district court. *Affirmed.*

Seager & Lobben and *W. S. Hammond*, for appellant.

L. K. Luse and *Lorin Cray* (*Thomas Wilson*, of counsel), for respondent.

MITCHELL, J. This was an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. When the plaintiff rested, the court, on motion of the defendant, dismissed the case, on the ground that the plaintiff had failed to establish a cause of action. From an order denying a new trial, the plaintiff appealed. Case Stated.

There is no dispute as to the evidentiary facts. The deceased was a yard switchman in defendant's yard at St. James, and met his death about 9 o'clock of the evening of January 27, 1897, by being run over by the cars while at-

tempting to cut off a car from a moving train which was being made up in the yard at that time. The claim of the plaintiff is that the accident resulted from deceased slipping on the snow or ice, and falling under the wheels of the moving cars. Under the evidence, the only possible claim upon which any negligence of the defendant can be predicated is the slippery condition of the yard, by reason of the presence of snow and ice. The snow had not drifted or piled up; neither were there any artificial piles or banks. The natural fall of snow had been trodden down to about the level of, or a little below, the tops of the rails. There were no holes or hummocks, but its surface was substantially level throughout the yard, except that the snow had been removed just inside the rails, where the flanges of the wheels run. This rendered the surface of the snow between the rails of the several tracks somewhat higher in the center than at the rails, but this fact in no way conduced to the accident, for the reason that the deceased was at the time outside the rails, in one of the spaces between tracks. While the occupation of switchmen in a railroad yard is a hazardous one, and railroad companies should exercise a degree of care commensurate with the risks, reasonable care does not require them to remove all the snow from their yards. In this climate it would be practically impossible to do so, and we apprehend that no company ever attempted it. So far as slipperiness is concerned, a partial removal of the snow would be useless, for the surface of snow half an inch deep would be just as slippery as if it was six inches deep. So long as it is not allowed to accumulate higher than the rails, and the surface is kept practically level, and the snow not permitted to accumulate in dangerous hummocks or ridges, or to contain dangerous holes, no negligence can be charged against the company, unless under very special and peculiar circumstances, because they have not removed the snow. Counsel for the plaintiff does not really claim otherwise, but his contention is that a railroad company ought (at least, where the surface of the snow is very slippery) to place ashes or cinders upon it,—at any rate, that this is a question for the jury. Aside from other objections to adopting any such method, it is practically impossible, in view of the number and size of railroad yards, and the frequent falls of snow and changes of weather in our northern winters.

Injury to Employee—Accumulation of Snow in Switch Yard—Liability of Master.

We hardly think that any railroad company has ever

attempted, or was ever expected, to do anything of this kind. But, even if the negligence of the defendant would otherwise have been a question for the jury, the action was properly dismissed because it conclusively appears that the deceased must, or, in the exercise of reasonable care, should, have known the exact condition of the yard, and all the risks incident to such condition. He was an experienced railroad man. He had been in the employment of the defendant for quite a number of years as a brakeman on trains running in and out of this yard. He had been steadily employed in it as a yard switchman from the previous October up to the time of his death. During most of this period his work was in the daytime. During that winter the yard had been in substantially the same condition as when he was killed. He was therefore perfectly familiar with the situation. He must have known that the defendant had not been in the habit of removing the snow, or covering it with anything to obviate the slipperiness of its surface. He had been at work all of the day previous to the one on which he was killed. The presence of the snow and the condition of its surface were perfectly obvious to the senses, and the danger or risk from slipping and falling must have been fully appreciated by any one of sufficient intelligence to understand the operation of the simplest laws of nature. It appeared from the evidence that it had rained and sleeted on January 26th, and thawed during the forenoon of the 27th, and then turned cold and froze in the afternoon of the latter day; and it is urged that, as he was not at work during that day, he did not or might not have known of the increased slipperiness of the surface of the snow, resulting from the changes of the weather. But he must have known of these changes, for he was at work in the yard all of the day of the 26th, in the sleet and rain; and, when he went out to work on the evening of the 27th, he must then, if not sooner, have discovered the change in the weather, and must have been perfectly aware of the effect of such a change according to the laws of nature.

Same—Employee Chargeable with Notice.

It is unnecessary to consider the correctness of the action of the court, referred to in the first and second assignments of error, in excluding or admitting evidence, for the reason that, whether admitted or excluded, the evidence could not have changed the result. Order affirmed.

CHICAGO & E. I. R. CO.

v.

DRISCOLL.

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Switch Yard—Absence of Butt Post—Negligence.*—The failure to put a butt post at the end of a stub switch in a switch yard is not such evidence of negligence as should be submitted to a jury.

Same—Same—Custom of Other Companies.—In an action against a railroad company for the death of an employee, it is error to admit evidence that other roads had in their switch yards butt posts or other obstructions at the ends of stub tracks, although it was claimed that the accident was partially attributable to defendant's failure to have a butt post in its yard.

Fellow Servants.*—Members of two switching crews working in the same yard, at the same kind of work, are, in regard to each other, fellow servants.

Same—Question of Law.—While, as a general rule, the question as to whether the relation of fellow servant exists is one of fact, yet where the facts are conceded, or where there is no dispute as to the facts, and they show beyond question that such relation exists, then the question may become one of law.

Negligence—Pleading and Proof.*—In such an action, plaintiff cannot allege a specific act of negligence, and recover upon proof of negligence of a different character.

Existence of Danger—Notice to Vice-Principal.—In such action, it was incumbent upon plaintiff to sustain by affirmative proof the allegation that defendant's assistant yard master (a vice-principal) knew, or was chargeable with notice, of the dangerous position of a car before the accident, and she failed to so sustain it.

APPEAL by defendant from appellate court, First district. *Reversed.*

Will H. Lyford, *William J. Calhoun*, and *Albert M. Cross*, for appellant.

James C. McShane, for appellee.

*See notes at end of case.

Chicago & E. I. R. Co. *v.* Driscoll

Case Stated.

PHILLIPS, J. This is an appeal from a judgment of affirmance by the appellate court for the First district of a judgment for $5,000, rendered by the circuit court of Cook county against appellant and in favor of appellee, for causing the death of her husband.

The declaration charges that the defendant negligently maintained in its freight yard a certain track without any butt post or other obstruction at the end thereof, and because of such absence a car had been run off the track onto the ground before the accident, by a crew with which Driscoll, the deceased, had no connection; that the switching crew of which the deceased was a member coupled its engine to a train on this track, of which train this car was a part, and, in moving the train, the car, because of being off the track, was thrown against a standing train on an adjoining track, and Driscoll was caught between the moving and standing trains, and killed. Other counts of the declaration charge that defendant had in its employ an assistant night yard master, not a fellow servant of the deceased, who knew, or by the exercise of ordinary care might have known, this car was off the track, and knew, or might have known, that the deceased and his crew were ignorant thereof; but he negligently ordered Driscoll and his crew to attach their engine to and move the train without notifying the crew of the position of this car, whereby Driscoll was caught in a collision between a car off the track and a train on an adjoining track and killed. Another count alleges that a switching crew with which Driscoll was not connected was guilty of negligence in pushing this car off the track, etc.

Two switching crews were employed in the same switch yard, and both handled this train which caused the accident within a few minutes of its occurrence. One was known as "Hurd's Crew" and the other as "Ward's Crew." Driscoll had been a member of both crews, and was familiar with their work and the yard and tracks, but at this time was working with Ward's crew. Three of the tracks were used as repair tracks, and were stub tracks, at the ends of which no butt posts had ever been erected, but were left open, so that if a car was pushed too far it would run off onto the ground. It was the duty of Hurd's crew to switch cars on these repair tracks and remove cars therefrom, and to also transfer cars to other switch yards. Ward's crew also switched cars onto and removed cars from these repair tracks and made up and broke up trains. Both crews were at work

in the yard, breaking up and making up freight trains, switching and removing cars, using the repair and yard tracks with equal frequency, often on the same track, constantly working near each other, with duties of the same character. Within the limits of the yard, the duties of the two crews were identical and performed at the same time. Each crew consisted of five men,—an engineer, a fireman, a foreman, and two helpers. One member had the duty of making couplings in the front part of the train, opening switches ahead of the engine, and repeating to the engineer signals from the rear. It was the duty of another member of the crew to act as rear man. His duties were to go to the rear end of the train on a repair track to see that all cars were properly coupled and the train in proper condition to be moved, to give signals from the rear, and close switches behind the train. These duties were performed by the foreman and helpers indiscriminately. Driscoll had frequently acted as rear man, and was performing those duties on the evening of the accident. There is no dispute about these facts, and they appear from plaintiff's evidence and are uncontroverted. On the evening of the accident, Hurd's crew pushed all the cars together on the track on which the accident occurred, coupled them together, and left them standing with the rear wheels of the rear car about 10 inches from the end of the rails and on the track. His crew then pulled the cars from two other stub tracks, backed them onto the track where the accident occurred, and coupled the train of cars, and left it, and saw it no more until after the accident. There is no evidence in this record that Hurd's crew, in making up this train, pushed the car off the track. Ward's crew was ordered to take this train from the track from where it was so made up, and distribute it, but the time between the departure of Hurd's crew and the arrival of Ward's crew is not shown. After coupling onto this train, and attempting to pull out, the accident occurred as alleged. When and how this car became thus partially off the track, from this record is unknown.

To meet the evidence of plaintiff that no butt post was placed at the end of the stub track on which the accident happened, the defense introduced evidence that when butt posts were placed at the ends of the tracks it frequently happened that a train would back in at a considerable speed, and the momentum of a heavy train, moving rapidly, would, upon impact with the post, wreck cars of the train, but that

without such posts switching crews would have to stop the train, and would be more watchful than if reliance would be placed on a butt post. Plaintiff introduced eight witnesses, who, over the objection of the defendant, were permitted to testify as to the number of years they had been in railroad service, and that they were familiar with the manner in which stub tracks were constructed, with reference to obstructions placed at the ends of such tracks, by reputedly well-regulated roads in Chicago. Each of these witnesses was then asked how stub tracks were constructed by railroad companies in this particular, and to this question, when put to each witness, defendant objected, its objection was overruled, and an exception was taken. Each witness then answered that obstructions of some sort were usually placed at the ends of stub tracks. At the close of the evidence for plaintiff, and at the close of the entire testimony, the defendant asked instructions to find for the defendant, which were refused, to which the defendant excepted.

From these facts these questions are presented: First, whether a failure to put a butt post at the end of a stub switch in a switch yard is such a showing of negligence in the construction of the track as should be submitted to a jury; second, whether it was error to admit evidence that other roads were constructed with butt posts at the ends of such stub tracks; third, whether members of two switching crews working in the same yard are fellow servants; fourth, whether, under the evidence, appellant is liable for the alleged negligence of Hurd's crew, or of Blake, the assistant night yard master.

With reference to the first proposition, it may be said that the manner of constructing a railroad is an engineering question. A railroad company cannot be required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care. Public policy does not require courts to lay down any rule as to the manner of construction of railroads. The hazardous character of the business of operating a railroad, and the danger to life, body, and limb of employees thereon, may well call for specific legislation having for its object the protection of the person of the employee and of the traveling public, and yet it is not a question for a court to submit to a jury whether the manner of construction of a railroad is proper or not. A verdict is not a precedent, and is not bind-

Switch Yard—Absence of Butt Post—Negligence.

ing on another jury. One jury might find the construction a proper one while another jury might find it an improper one, and the important engineering question of the manner of constructing a railroad would thus be left to the varying and uncertain opinions of jurors. The only question proper to submit to a jury in such cases is whether the premises as they existed at the time of the injury were reasonably safe. Twitchell *v.* Railway Co., 39 Fed. 419; Railroad Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55; McGinnis *v.* Bridge Co., 49 Mich. 466, 13 N. W. 819; Hewitt *v.* Railway Co., 67 Mich. 61, 34 N. W. 659; Tuttle *v.* Railway Co., 122 U. S. 189, 7 Sup. Ct. 1166; Railway Co. *v.* Armstrong, 62 Ill. App. 228. There could be no recovery for a failure to have a butt post or other obstruction at the end of the stub track. For the above reasons it was also error to admit evidence that other roads had in their switch yards butt posts or other obstructions at the ends of stub tracks.

Same—Same—Custom of Other Companies.

The next question presented is whether the two switching crews are fellow servants of each other. In Railway Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273, we held, in substance, that where the evidence is conclusive and uncontradicted, and reasonable minds must reach the same conclusion on the facts, then negligence would become a question of law. On the same principle, while, as a general rule, the question as to whether the relation of fellow servants exists is one of fact, yet where the facts are conceded, or where there is no dispute whatever as to the facts, and they show, beyond question, that the relation of fellow servants exists, then the question may become one of law. Railway Co. *v.* Brown, *supra;* O'Leary *v.* Railway Co., 52 Ill. App. 641; Railway Co. *v.* Malaney, 59 Ill. App. 114; Klees *v.* Railroad Co., 68 Ill. App. 244. In this case, as regards the performance of the duties of the switching crews and the character of their work while in the yards, the service was almost identical, and shows beyond question the relation of fellow servants existed.

Fellow Servants.

Same—Question of Law.

Under the counts charging negligence in failing to have butt posts or other obstructions placed at the end of the stub track, and under the count charging another switching crew in the same yard with negligence, the peremptory instruction to find for the defendant should have been given.

The declaration charges that the assistant night yard mas-

ter was a vice principal, and not a fellow servant, with Driscoll; that he knew, or should have known, that the car was off the track; that he negligently gave an order to move the train without warning Driscoll and his crew of this danger. It is not alleged the defendant knew or did anything, but a named vice principal is alleged to have done or omitted certain acts. Such an allegation limits its liability to the alleged acts of the vice principal so named. Under such a declaration, the defendant would not be liable for a breach of a general duty which it owes a servant, nor for the negligence of some other agent whose negligence is not specifically alleged. The rule is fundamental that a plaintiff must recover, if at all, upon the case made by his declaration, and in the application of this rule to actions for negligence plaintiff cannot allege a specific act of negligence and recover upon proof of negligence of a different character. Railway Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899; Railroad Co. *v.* Bell, 112 Ill. 360.

Negligence—Pleading and Proof.

In Railroad Co. *v.* Martin, 154 Ill. 523, 39 N. E. 140, the plaintiff, a passenger, was injured in a collision. No count in the declaration charged the defendant, generally, with negligence. Each count charged that a certain servant in charge of the car was negligent in failing to keep a lookout, and in failing to go ahead to the railway crossing and look for approaching trains. An instruction was given to the jury stating the presumption of negligence which the law raises from the happening of an accident, and the consequent liability of the defendant unless it affirmatively disproved all negligence. It was held the instruction was improperly given, because plaintiff could not recover on any general theory of defendant's negligence, he having in his declaration limited the negligence charged to a particular one of defendant's servants. In this case, the allegation that Blake, the assistant night yard master, knew, or in the exercise of ordinary care ought to have known, of the dangerous position of this car before the accident, must be shown by actual knowledge, or that the defect complained of had existed for such a length of time that Blake, in the exercise of ordinary care, should have discovered it. There is no proof of actual knowledge on his part; neither is there proof existing as to how long this car was actually off the track. Under the evidence in this record, it is as fair to assume that it was pushed off the track when

Existence of Danger—Notice to Vice Principal.

Ward's crew coupled on for the purpose of pulling out the train as to assume that it was pushed back by Hurd's crew, the fellow servants of Driscoll. Notice must be affirmatively shown.

In Railway Co. *v.* Troesch, 68 Ill. 545, it was said (page 552): "The cases in this state and in sister states are with unanimity to the effect, if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given he was ignorant of the same through his own negligence or want of care."

In Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62, a brake gave way, throwing plaintiff from the top of a car to the ground. The nature of the defect or how long it existed was not shown. It was held that the burden of the proof was on the plaintiff to show affirmatively that the defect complained of had existed for such a length of time that the defendant, in the exercise of ordinary care, should have discovered it, and, the proof failing to show this affirmatively, plaintiff could not recover. There is no evidence in this record to show that Blake was charged with the duty of examining the rear end of the train to see whether a car was off the track, but the evidence does show that it was the duty of the rear man of the switching crew to see that the cars were all right.

In Railroad Co. *v.* Jewell, 46 Ill. 99, a brakeman was injured by reason of a defective brake, and it was held the defect did not show such negligence as to charge the company, for the condition of the brake was a matter under the special care of the brakeman, whose business it was at all times to see that it was in a fit condition for use and report defects to the company, and the company should not be made to suffer for his negligence of a plain duty.

In Railway Co. *v.* Eddy, 72 Ill. 138, a brakeman was injured by a defective ladder on the car, and it was said (page 140): "It was the duty of appellee to see and know that the ladder was in repair, and, if not, to have reported it to the proper person for repair. He had no right to act with recklessness in using machinery out of repair, and, if he received injury thereby, to hold the company responsible for the injury resulting from his carelessness or neglect of duty in not reporting it out of repair."

In Railroad Co. *v.* Bragonier, 119 Ill. 51, 7 N. E. 688 (a suit by a brakeman who was injured by reason of the defective condition of a brake), it was alleged that the defendant knew, or by the exercise of a high degree of care might have known, of the existence of such defect in time to have repaired it. A series of instructions was given for the plaintiff, to the effect that if defendant, by the exercise of ordinary care, might have discovered the defect, and if the plaintiff, in the exercise of ordinary care, could not have discovered it, defendant was liable. It was held error, for the reason that the duty devolved upon the brakeman to examine the brake, and, if he found it defective, to report it.

In these last three cases it does not appear that the brakeman had any previous knowledge of the condition of the brake. The principle on which those cases were based was that the duties of the brakeman brought him in connection with the brake, and the master could only become cognizant of a defective condition by a report made to him, and the proper person to so report was the brakeman. In this case the condition of the cars, and whether they were in a condition to be moved, could only be determined by an examination made by some employee. The employee designated to make such examination was the rear man of the switching crew,—the position filled by Driscoll at the time he was killed. No actual knowledge being shown to exist on the part of Blake, and no affirmative proof to show constructive or implied notice, plaintiff could not recover.

We hold that the instruction to find for the defendant under each count of the declaration should have been given, and it was error to refuse it. The judgments of the appellate court for the First district and of the circuit court of Cook county are each reversed, and the cause is remanded. Reversed and remanded.

MAGRUDER, J. (dissenting). I do not agree with the conclusion reached by this opinion, nor with the reasoning by which it is sought to sustain such conclusion. That portion of the opinion which holds that the relation of master and servant is, under any circumstances, a question of law, is opposed to many decisions made by this court. As is said in an opinion filed at the present term, it is for the court to define the relation as matter of law, and then for the jury to find whether the particular facts come within the definition given by the court.

NOTES

Negligence—Construction of Track—Absence of Bunters.—A railroad track was laid upon a descending grade, which at its lower end stopped at a street. There was no bunter or other obstruction to prevent cars from going beyond the end of the track. There was a telegraph pole near the end of the track and in the street. Plaintiff, a hackman, was standing with his team in the street. Some cars suddenly, and apparently without the fault of the railroad company, became detached from a train, ran beyond the end of the track, struck against the telegraph pole which was thereby broken, and the wires fell upon plaintiff's horses frightening them and causing them to injure plaintiff. *Held*, that the jury were authorized to find that a bunter should have been put up to guard against just such accidents, and that the evidence was sufficient to sustain a verdict for the plaintiff. Shaw *v.* New York & New England R. Co. (Mass.), 41 Am. & Eng. R. Cas. 547.

Fellow Servants.—Fellow-servants within the rule are persons engaged in the same common service under the same general control. Gravelle *v.* Minneapolis & St. L. R. Co., 3 McCrary (U. S.) 352, 10 Fed. Rep. 711; Totten *v.* Pennsylvania R. Co., 11 Fed. Rep. 564; Chicago & N. W. R. Co. *v.* Scheuring, 4 Ill. App. 533; Kranz *v.* White, 8 Ill. App. 583; Chicago & E. I. R. Co. *v.* Hagar, 11 Ill. App. 498; Chicago, B. & Q. R. Co. *v.* Stafford, 16 Ill. App. 84; Louisville & N. R. Co. *v.* Collins, 2 Duv. (Ky.) 114; New Orleans, J. & G. N. R. Co. *v.* Hughes, 49 Miss. 258; Louisville, N. O. & T. R. Co. *v.* Conroy, 63 Miss. 562; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. Rep. 916; Coon *v.* Syracuse & U. R. Co., 6 Barb. (N. Y.) 231; Donnelly *v.* Brooklyn City R. Co., 34 Am. & Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; reversing 39 Hun 657, mem.; Warner *v.* Erie R. Co., 39 N. Y. 468; reversing 49 Barb. 558; Loughlin *v.* State, 105 N. Y. 159, 11 N. E. Rep. 371; Dobbin *v.* Richmond & D. R. Co., 81 N. Car. 446; Ponton *v.* Wilmington & W. R. Co., 6 Jones (N. Car.) 245; Hardy *v.* Carolina C. R. Co., 76 N. Car. 5, 14 Am. Ry. Rep. 309; Mad River & L. E. R. Co. *v.* Barber, 5 Ohio St. 541; Cleveland, C. & C. R. Co. *v.* Keary, 3 Ohio St. 201; Whaalan *v.* Mad River & L. E. R. Co., 8 Ohio St. 249; Texas & P. R. Co. *v.* Scott, 64 Tex. 549; Waller *v.* South Eastern R. Co., 9 Jur. N. S. 501, 32 L. J. Ex. 205, 11 W. R. 731, 8 L. T. 325, 2 H. & C. 102; Swainson *v.* North Eastern R. Co., 47 L. J. Ex. 372, 38 L. T. 201, 26 W. R. 413, L. R. 3 Ex. D. 341; reversing 37 L. T. 102, 25 W. R. 676.

The servants must have been in the same line or department of employment. Buckley *v.* Gould & C. Silver Min. Co., 8 Sawy. (U. S.), 394, 14 Fed. Rep. 833; Chicago & N. W. R. Co. *v.* Swett, 45 Ill. 197; Indianapolis & St. L. R. Co. *v.* Johnson, 102 Ind. 352, 26 N. E.

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Rep. 200; Bogard *v.* Louisville, E. & St. L. R. Co., 100 Ind. 491. Indiana Car. Co. *v.* Parker, 100 Ind. 181; Sullivan *v.* Toledo, W. & W. R. Co., 58 Ind. 26; Columbus & I. C. R. Co. *v.* Arnold, 31 Ind. 174; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Ohio & M. R. Co. *v.* Tindall, 13 Ind. 366; Madison & I. R. Co. *v.* Bacon, 6 Ind. 205; Farwell *v.* Boston & W. R. Corp., 4 Metc. (Mass.) 49; Hunn *v.* Michigan C. R. Co., 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502; Little Miami R. Co. *v.* Fitzpatrick, 42 Ohio St. 318; Mensch *v.* Pennsylvania R. Co., 53 Am. & Eng. R. Cas. 198, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548; Dwyer *v.* American Exp. Co., 53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304; Brabbits *v.* Chicago & N. W. R. Co., 38 Wis. 289; Moseley *v.* Chamberlain, 18 Wis. 700.

The servants, to be fellow-servants, must be engaged in a common work or in the same general undertaking. Parrish *v.* Pensacola & A. R. Co., 28 Fla. 251, 9 So. Rep. 696.

Negligence—Pleading and Proof.—In an action to recover damages for negligence, the plaintiff must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that they occurred through or by the negligence of the defendant. The plaintiff must state the facts constituting his cause of action. He cannot state one and prove another. Nor, if he states one, can he supply the defects in his complaint by evidence at the trial. In such action the evidence on the part of the plaintiff must be directed to the proof of the facts alleged, and the instructions of the court must be confined to the allegations and proofs. It is the law arising upon those allegations, and upon the evidence offered to sustain them, which the court is to give to the jury. It is the facts thus ascertained, and the law applicable to them, which will authorize a verdict. Woodward *v.* Oregon R. & Nav. Co., Or. Sup. Ct., Jan. 6, 1890. STRAHAN, J., who delivered the opinion of the court, said: "Instructions numbered 3 and 5 present somewhat analagous questions, and may be considered together. The point of obligation to these instructions is that they submit to the jury questions entirely outside of and beyond the allegations of the plaintiff's complaint, and apparently leave it to the jury to find as they may think proper, regardless of the particular acts of negligence charged in the complaint; and this leads us to the inquiry whether or not the plaintiff must allege the particular acts of negligence constituting his cause of action, and then confine his proof to those specific allegations. Our Code, § 66, requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action; and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon

Notes

the record the specific and particular facts which he claims entitle him to recover. The field of inquiry is thus narrowed, and the defendant is enabled to come into court advised beforehand of the particular facts he must come prepared to contest. Does this rule apply to an action of negligence? In Heilner *v.* Union County, 7 Or. 84, this court held, in an action for negligence in allowing a bridge to be and remain out of repair, that the facts constituting the negligence should be averred. So it was held, in Lakin *v.* Oregon Pac. R. Co. 15 Or., 220, 34 Am. & Eng. R. Cas. 500, that a defect of a car or an engine could not be shown in an action where the damage was alleged to have occurred through the negligence of the employees, and the defects of the engine or machinery were not relied upon as a cause of action. Waldhier *v.* Hannibal & St. J. R. Co., 71 Mo. 514, is more directly in point. It was there held that where the allegation in a petition against a railroad company is that the plaintiff received the injuries complained of through the negligence of the company in having and using defective machinery, and the running and managing its railroad and cars, and the proof was that the injury was occasioned by a broken frog, the plaintiff could not recover. To the same effect is Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542. In that case the court said: 'It is only by statutory enactment that defendant is required to sound the whistle or ring a bell eighty rods distant from a point where the railroad crosses a public road; and, if defendant was intended to be made liable on account of this neglect, such intention should in some manner have been expressed in the petition, either by statement of the facts which, under the statute, created the liability, or by some appropriate reference to the statute itself.' So, in Edens *v.* Hannibal & St. J. R. Co., 72 Mo. 212, 5 Am. & Eng. R. Cas. 459, it was held that whatever was the real ground of complaint should be stated in the petition. Hence in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine, and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. So, *in* Field *v.* Chicago, R. I. & P. R. Co., 76 Mo. 614, the court said: 'The plaintiff must state the facts which constitute his cause of action. He cannot state one and prove another; nor, if he states none, can he supply the defects in his petition by evidence at the trial.' So, also, in Chicago, B. & Q. R. Co. *v.* Harwood, 90 Ill. 425, it was held, in an action against a railway company to recover damages for the killing of the plaintiff's intestate, through negligence and carelessness in the managing and running of a train of cars, the declaration should show in what such negligence and carelessness consisted,

and not charge the same in general terms, without disclosing any specific acts or omissions; and Thomas *v.* Georgia, R. & B. Co., 40 Ga. 231, holds that a plaintiff must recover on the particular acts of negligence charged in the complaint, and that other acts of negligence not alleged, cannot be made the basis of a recovery. So, in Long *v.* Doxey, 50 Ind. 385, it was held that a right to recover on a complaint charging negligence in the use of defective machinery could not be supported by proof of negligence in employing unskillful men to run the machinery. So, also, in Ohio & M. R. Co. *v.* Selby, 47 Ind. 471, in an action for negligence, it was held that an act the doing of which was complained of, and that such act was negligently done, must be alleged; also, that when the act complained of was sufficiently stated it was only necessary to aver that such act was negligently done, without setting out in detail the particulars of the negligence. It is true, in some jurisdictions, it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, is at variance with the plain requirements of the Code, and would give the defendant no notice of the acts claimed to be negligent, so that he might come prepared to meet them."

CHICAGO, B. & Q. R. CO.

v.

OYSTER.

(*Supreme Court of Nebraska, Feb. 23, 1899.*)

Wrongful Death—Right of Action.—Under chapter 21, Comp. St., an action for the wrongful death of a person may be maintained by his personal representative, where the person deceased left surviving him some one belonging to the class for whose benefits the statute was enacted, who has sustained pecuniary loss by his death.

Distribution of Damages.—The damages recovered in such an action are assets for proper distribution to "widow and next of kin" of the decedent.

Sufficiency of Petition—Harmless Error.—A petition under LORD CAMPBELL'S act should disclose the names of all the beneficiaries,

but if the names of the surviving minor children of the decedent, who were dependent upon him for support, are averred, the omission to allege whether or not he left a widow will not render the pleading bad on demurrer.

Same—Same.—One cannot predicate error on the refusal to require the pleading of the opposite party to be made more definite and certain, where prejudice has not resulted from the ruling.

Assignments of Error.—An assignment in a petition in error that "the verdict of the jury is not sustained by sufficient evidence, and is not in accord with the evidence and instructions," is sufficiently definite and specific to require the appellate court to review the evidence preserved in the bill of exceptions, to ascertain whether the same supports the finding and judgment.

Injury to Employee—Negligence of Fellow Servant—Burden of Proof.—The burden is on the master, if it claims it, to show that the injuries received by a servant were caused by the negligence of a fellow servant.

Same—Same—Pleading.—Whether such a defense must be specifically pleaded, to be available, is not decided.

Contributory Negligence—Pleading.—A general allegation in an answer of contributory negligence on the part of the plaintiff is good, as against a demurrer *ore tenus*.

Rules.*—Rules of a railroad company are not binding on an employee who it is not shown had notice or knowledge thereof.

Res Gestæ.—The testimony of a witness, describing the positions of a decedent and the engine shortly after the accident which resulted in the death of the plaintiff's intestate, was admissible as *res gestæ*.

Instructions.—A party cannot predicate error upon the giving of a vague instruction, unless he has requested a proper one.

Same—Review.—Upon review, instructions should be considered as an entirety.

Roadbed, Appliances, etc.,—Due Care in Furnishing.*—A railroad company is only required to exercise reasonable and ordinary care and diligence in furnishing its employees reasonably safe roadbed, machinery, and appliances for the operation of its road. The law does not impose the absolute duty of providing a reasonably safe roadbed, but makes the company liable for negligence in that regard.

Instructions.—An erroneous instruction is not cured by merely giving another instruction stating the law correctly on the subject.

Misconduct of Jurors.—In an action against a railroad company

*See notes at end of case.

for wrongfully causing the death of plaintiff's intestate, misconduct of jurors in visiting and examining the locality of the accident without permission of the court or knowledge of the parties is not ground for setting aside the verdict, where it is disclosed that such view did not influence the finding.

(Syllabus by the Court.)

ERROR by defendant to Phelps county district court. *Affirmed.*

J. W. Deweese, *F. E. Bishop*, and *W. S. Morlan*, for plaintiff in error.

Abbott, *Selleck & Lane*, for defendant in error.

NORVAL, J. Action by Margaret E. Oyster, administratrix of the estate of Granville R. Oyster, deceased, against the Chicago, Burlington & Quincy Railroad Company, to recover damages for negligently causing the death of decedent. Plaintiff obtained a verdict in the sum of $5,000, and the defendant has instituted this proceeding for the purpose of securing a reversal of the judgment entered thereon.

Case Stated.

A brief reference to the issues presented by the pleadings in the cause will aid in an understanding of the questions urged upon our attention. The petition avers the appointment and qualification of the plaintiff as administratrix of the estate of Granville R. Oyster, deceased; the incorporation of the defendant, and the operation by it of a line of road extending from the Missouri river, through the city of Holdredge, to the east line of the state of Colorado; the employment of decedent by the defendant as a locomotive engineer on and for some time prior to July 29, 1894; that on said date, in the proper and careful discharge of the duties of his said employment, and under the directions of defendant and its officers and agents, the said Oyster was running the engine used to pull the regular night passenger train from McCook to Hastings, and when said engine arrived at the city of Holdredge it ran into an open switch, left the rails of the track, overturned, violently throwing said Oyster down under the engine, breaking his leg, bruising and scalding his flesh, and from which injuries he died the second day thereafter; that said accident was occasioned through no fault, failure of duty, or negligence of decedent, but by reason of the defendant having negligently, carelessly, and wrongfully left open the said switch, without proper, usual, and customary display of sig-

nal lights or other means of warning, so as to advise him of the open switch and the condition of the roadbed; and that Oyster left surviving him six minor children, whose names and ages are stated in the petition, who were wholly dependent upon him for support, and by reason of his death are left helpless and destitute. The defendant filed a motion to require the plaintiff to make her petition more definite and certain, by alleging therein whether the intestate left surviving him any widow. This motion was denied by the court, whereupon a general demurrer to the petition was interposed and overruled. An answer was filed, which admits the incorporation of the defendant and the employment of plaintiff's intestate, denies the appointing of Margaret E. Oyster as administratrix, and avers "that the accident whereby the death of Granville R. Oyster was caused was the result of his own carelessness, negligence, and disobedience of the rules and regulations of the defendant governing his conduct as a locomotive engineer, and that said accident was caused without any fault or negligence on the part of the defendant." It is further pleaded in the answer that the person deceased left at the time of his death surviving him, his wife, the said plaintiff, Margaret E. Oyster, and that said action is not brought for the benefit of the widow, and hence there is a defect of parties plaintiff, and the action should abate and be dismissed. The answer closes with a general denial of each averment contained in the petition, except those previously admitted. The reply admitted that Margaret E. Oyster was the decedent's widow, and then denied all the other allegations in the answer.

The petition contains no averment as to whether or not Oyster left surviving him any widow, and it is argued from this that no cause of action is stated against the defendant, and that the motion to make the petition more definite and certain in that particular should have been sustained. The action was under chapter 21, Comp. St., called "LORD CAMPBELL'S Act." Section 2 of said chapter declares "that every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in

Wrongful Death —Right of Action.

every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." This section has more than once been considered by this court, and the uniform holding has been that an action for the wrongful death of a person cannot be maintained where it is not disclosed that the decedent left surviving him some one belonging to the class for whose benefit the statute was enacted, and who has sustained pecuniary loss by the death of the deceased person. Anderson *v.* Railroad Co., 35 Neb. 95, 52 N. W. 840; Electric Co. *v.* Laughlin, 45 Neb. 390, 63 N. W. 941; Orgall *v.* Railroad Co., 46 Neb. 4, 64 N. W. 450; City of Friend *v.* Burleigh, 53 Neb.—, 74 N. W. 50; Railroad Co. *v.* Crow, 53 Neb. 747, 74 N. W. 1066. The damages recovered by a personal representative of a deceased person for the wrongful death of the intestate are assets for the proper distribution to "the widow and next of kin," and are not subject to the payment of the debts of the decedent. A petition, therefore, under LORD CAMPBELL'S act, is defective, which fails to disclose that the person deceased left a widow or next of kin depending upon him for support. Railroad Co. *v.* Crockett, 17 Neb. 570, 24 N. W. 219. Manifestly, it was not the intention of the legislature to give an action under said act only where both a widow and next of kin survive the person deceased. The action is well planted if there exists either a widow or next of kin on whom the law confers the right to be supported by the person killed. It is evident that this is the meaning of the section quoted; and the petition in this cause disclosing that Granville R. Oyster left, him surviving, six minor children, who were depending upon him for maintenance, the action was instituted for the benefit of persons within the class named in the statute. The demurrer was properly overruled.

Distribution of Damages.

The statute authorizes the action to be brought for the benefit of the widow and next of kin, and the petition should disclose all beneficiaries,—that is, whether the decedent left a widow or next of kin, or both; but it is very evident that the defendant was not prejudiced by the denial of its motion to require the plaintiff to aver in the petition whether a widow survived the intestate, for the reason that the defendant subsequently pleaded in its answer that Margaret E. Oyster, who sued as administratrix,

Sufficiency of Petition—Harmless Error.

was the widow of the decedent, and the reply admitted such averment to be true. So all the beneficiaries were named in the pleadings, and the existence of a widow was not a controverted point in the case. Certainly the fact that one of the beneficiaries was not mentioned in the petition could militate only against the plaintiff, and that in the assessment of the amount of damages. There is no defect of parties plaintiff. Margaret E. Oyster was the sole administratrix of the estate, and the action was properly brought by her, in her representative capacity, for the benefit of those in whose behalf it was prosecuted. She was the personal representative of the intestate, and alone could maintain the action. The widow or next of kin were not necessary parties thereto, but the damages recovered inured to their exclusive benefit.

Same—Same.

The verdict is assailed as being against the evidence. Counsel for the administratrix insist that this question is not properly presented for review by the petition in error. The tenth assignment therein is as follows: "The verdict of the jury is not sustained by sufficient evidence, and is not in accord with the evidence and instructions given." It is conceded that this would be a sufficient assignment in a motion for a new trial, but it is argued that it is too indefinite and uncertain for a pleading in this court. The rule is that alleged errors must be specifically pointed out in the petition in error, and that mere general assignments are unavailing. But the rule has never been carried to the extent now pressed by counsel. We have never required that the petition in error should specify the particular branch of the case, or the question of fact raised by the record, it is claimed the evidence was insufficient to sustain. We regard the objection now raised as entirely too technical and devoid of merit. The assignment is sufficiently definite to require the consideration of the evidence certified up in the bill of exceptions to ascertain whether the verdict is contrary thereto.

Assignments of Error.

There is but little, if any, conflict in the evidence. It is disclosed that Granville R. Oyster, plaintiff's intestate, was an experienced and careful engineer, and had been in the employ of the defendant for several years preceding the accident, in charge of an engine drawing a regular passenger train between McCook and Hastings. On the night of July 29, 1894, he started on his regular run from McCook, reaching

Holdredge on the regular schedule time, about 12:40 a. m. West of this last-named station is a switch connecting the main line with a side track. This switch had been negligently left open, so that a train from the west would enter the side track, instead of remaining on the main line. The switch had been usually provided with a lantern, to serve as signal to trainmen of the position of the switch. White lights were exposed if the main line was open for the passage of trains, while red lights were exhibited if the switch was thrown for entering the side track. One of these lanterns, early in the evening of the accident, had been placed on the switch stand by a sectionman; but the light had either been extinguished or had gone out three hours before, and was not burning at the time Engineer Oyster reached it with his train; nor was any signal exposed to indicate that the switch was not closed, nor was any warning given that he was approaching danger. The night was dark, and the train at the time was running at a moderate and reasonable rate of speed. When the train reached the switch, the engine, on entering it, was derailed; inflicting injuries upon Oyster, from the effects of which he soon thereafter died. Each and every averment in the petition is amply sustained by the evidence. The jury were justified in finding that the leaving of the switch open, without any signal or warning advising the engineer of such fact, was the proximate cause of the injury. Railroad Co. *v.* Wilson (Ind. App.) 38 N. E. 343. The defendant seeks to escape liability on two grounds: First, the accident was attributable to the acts of a fellow servant; second, plaintiff's intestate was guilty of contributory negligence. These objections will now receive attention.

In the first place, it should be stated that the claim that the accident was occasioned by the negligence of a fellow servant of Oyster was not pleaded in the answer. The burden was on the defendant to establish the defense, and it well may be doubted whether it was available without being pleaded. Railroad Co. *v.* House (Ill. Sup.) 50 N. E. 151; Nicolaus *v.* Railroad Co. (Iowa) 57 N. W. 694; Patterson *v.* Railroad Co. (Tex. Civ. App.) 40 S. W. 442. The evidence, however, fails to reveal that it was a fellow servant who locked the switch in question for the side track. It was shown that a train crew who had charge of a train which had arrived at Holdredge that evening over the Edgar branch had been using this side track and the switch

Same—Same—Pleading.

Injury to Employee—Negligence of Fellow Servant—Burden of Proof.

in question, but it does not appear that any one of said crew left the switch open, which caused the accident. Moreover, the evidence adduced fails to establish that the employment and duties of those in charge of the Edgar train were such as to constitute them fellow servants with plaintiff's intestate, within the rule laid down in the decisions of this court on that subject.

As to the defense of contributory negligence, counsel representing the plaintiff below insist that it was not pleaded in the answer, and hence must be disregarded here. There is no room to doubt that it is an affirmative defense, and, when relied upon, must be raised by suitable averments. This court, in harmony with the decisions in other jurisdictions, has decided that a general allegation of negligence in a petition is sufficient as against a demurrer. Railroad Co. *v.* Wright, 49 Neb. 456, 68 N. W. 618. And, by a parity of reasoning, a general averment in an answer charging contributory negligence on the part of plaintiff is good, unless assailed by a motion to make more definite and certain. In the case at bar the answer, in general terms, as we have already seen, pleads that the negligence of plaintiff's intestate contributed to the injury, and but for which the accident would not have occurred. The answer not having been assailed by motion, it must be held sufficient to raise the defense of contributory negligence. The argument in support of this defense is that, there being no light displayed on the switch stand, it was the duty of Oyster to have stopped his engine, and his failure so to do was in direct violation of the rules of the company, and the cause of the injury. There was introduced on the trial, over the objections of plaintiff, a book entitled "Rules of the Transportation Department," which purports to have been issued by the general manager of the Burlington & Missouri River Railroad Company in Nebraska. Rule 65, as contained in said book, is in the language following: "A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal, and the fact reported to the superintendent." The evidence tending to prove that said rules, including the one quoted above, were promulgated by the proper officer of the defendant company, is quite meager and unsatisfactory. But, waiving this point, for the purpose of the present investigation, it is not disclosed by competent proofs that the decedent ever saw or knew of

Contributory Negligence—Pleading.

the rule above quoted, and which it is claimed he violated by failing to stop his engine before reaching the switch. The witness C. A. Dixon, called on behalf of the company, testified in a general way that the engineers under him have a book of rules and instructions which govern and control them in the operation of trains, but it was not shown by the witness or by any one else that Oyster had any knowledge of the existence of the rule in question. Objection to the admission as testimony of said rule was distinctly made on that ground at the time. The proposition is not only sound on principle, but is abundantly supported by authority, that rules of a railway company are not binding on an employee, unless he has notice thereof, or the same has been brought to his knowledge. Railroad Co. *v.* McDonald (Ala.) 20 South. 472; Railroad Co. *v.* Berkey (Ind. Sup.) 35 N. E. 3; Railroad Co. *v.* Plunkett, 25 Kan. 188; Covey *v.* Railroad Co., 27 Mo. App. 170, 14 Am. & Eng. Enc. Law, 908, 909. It not having been established that the decedent was aware of the existence of the rule, manifestly he cannot be charged with contributory negligence in violating the same. Whether a party is guilty of contributory negligence is usually a question of fact, and from a perusal of this record we cannot say that the triors of fact were not fully warranted in finding that plaintiff's intestate was free from any negligence which contributed to the accident.

Rules.

In the brief of the company it is stated that "the court permitted witness Daily, Dr. Miller, and Mrs. Oyster to testify as to Oyster's physical condition after the hurt, the extent of his bodily injuries, and the length of time he was held under the engine and suffered pain"; and it is urged that such testimony was erroneously admitted. An examination of the pages of the bill of exceptions indicated above reveals that no one of the witnesses named testified, against an objection, to the pain and suffering of the decedent. It is true, the witness Daily described the position of Oyster under the engine, the length of time he was held there, and how the engine was taken off. This was a part of the *res gestæ*, and for that reason was competent evidence. Dr. Miller, a physician and surgeon, was called to see Oyster shortly after the accident, and during the same night. The witness was permitted to answer but two questions, to which objections had been interposed by counsel for defendant, which questions, with the objections and the answers made by the witness, follow: "Q. What condition did you

Res Gestae.

find Mr. Oyster in? (Defendant objects as immaterial, under the issues joined. Overruled. Exception.) A. I found him prostrate from an injury. Q. What sort of an injury? (Defendant objects as immaterial, under the issues joined. Overruled. Defendant excepts.) A. He had a fracture of the small bone of the left leg, as well as extensive injuries to the soft tissues and muscles and flesh." The witness further testified, without objection, that he remained with the patient continuously, and rendered him proper and necessary medical treatment, until death, and that Oyster died from the shock resulting from the injury. Mrs. Oyster testified that she arrived at Holdredge the morning after the accident, and remained with her husband until the evening of July 31st, when he died. She testified, against objection of defendant, that she found her husband "just resting. He had not roused up from the accident, but did in a very few minutes." It requires one with a keener perception than the writer possesses to discover any prejudicial error in all this testimony, which merely showed the extent of decedent's injuries, and how they occurred. The testimony did not unduly tend to excite the sympathy of the jury.

Some of the instructions to the jury given by the court at the request of the plaintiff are assailed as being erroneous.

Instructions.

In the first three of these instructions the jury were told, in substance, that it was the duty of the defendant to use all reasonable care and foresight to provide such lights and signals for the switches as were necessary and reasonable for the safety of Oyster in the prosecution of his duties, and to exercise all reasonable care in inspecting and keeping in proper order and condition for use its lights, lamps, signals, and switches. The vice imputed to these instructions was that they did not inform the jury what constituted reasonable care. If the defendant desired the jury to be advised upon that point, it should have tendered an appropriate instruction, and requested the court to give it. Not having done so, it cannot predicate error upon the failure of the court to define what constitutes reasonable care. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107; Barr *v.* City of Omaha, 42 Neb. 341, 60 N. W. 591; Gran *v.* Houston, 45 Neb. 813, 64 N. W. 245; Lead Co. *v.* Kinlin, 47 Neb. 409, 66 N. W. 536; Ferguson *v.* State, 52 Neb. 432, 72 N. W. 590.

Instruction No. 4 given at the request of plaintiff below reads thus: "You are instructed that the said Granville R.

Same—Review.

Oyster was not obliged to know or inquire beforehand whether or not the switch was properly placed, and whether or not the proper lights and signals had been placed, but, in the absence of absolute knowledge to the contrary, he had the right to assume that all that could reasonably be done to render the roadway safe had been done. There is an implied undertaking or obligation on the part of the defendant with its employees to see that all that can reasonably be done to make the road safe had been done." By this instruction the court did not purport or attempt to state principles which should guide the jury in the determination of every feature of the case, but merely stated to the jury, in a general way, the obligations and duties resting upon the master relative to the furnishing of its employee with reasonably safe appliances for the performance of his duties, and that such employee had the right to assume, in the absence of the want of knowledge to the contrary, that the master has done all that could reasonably be required of him in that regard. So far as the instruction went, the correct rule was enunciated therein. It did not purport to treat of the question of contributory negligence. That feature of the case was fully covered by other instructions,in a more favorable way to the defendant than the law and facts warranted. The fourth instruction did not make it the absolute duty of the defendant to provide a safe roadbed and appliances. It obliged the company only to exercise reasonable care in that regard, and this the law required. The rule is that instructions must be construed together, and when,thus interpreted, they properly state the law, error cannot be predicated thereon. This principle has been so frequently stated by this court as to make the citation of the authorities in support thereof superfluous. It is said, in the argument, that the instruction quoted abrogated and nullified the rule promulgated by the company for the guidance of Oyster, the observance of which on his part would have saved his life. There are two answers to this contention: The decedent was not bound by the rule in question, since it was not shown that knowledge thereof was ever brought home to him. Again, by the third instruction given at the request of the defendant the jury were informed that, if the accident was occasioned by reason of Oyster disregarding a rule of the company, the plaintiff could not recover. It follows that the defendant was not prejudiced by the giving of the fourth instruction.

In the sixth instruction the jury were told "that it was the duty of the defendant company to provide the said Granville R. Oyster with a reasonably safe and clear roadbed upon which to operate said engine and train, and, further, that the said Granville R. Oyster had a right to rely on the defendant performing its duty in that regard; and, if the defendant failed in this duty, it will be liable to, and your verdict should be for, the plaintiff, unless you find that the said Granville R. Oyster knew that said roadbed was unsafe, or that the same was not clear in the manner in which it was usually operated, or that he was negligent or careless in the operation of said engine and train." We agree with counsel for defendant that the instruction was clearly erroneous, since it imposed upon the company the absolute duty of providing a reasonably safe and clear roadbed, while it owed no such obligation to its employees. All that the law required of it was (and the correct rule was also stated in the fourth instruction, already quoted) that the defendant exercise only reasonable and ordinary care to furnish a reasonably safe and clear road way for the use of his employees. Under this instruction, if the defendant had not been guilty of negligence, but had exercised reasonable care in the premises, and the accident had occurred by reason of its roadbed having become recently unsafe, it made the company liable. The defendant is held accountable for the negligent performance of a duty, and the failure to exercise reasonable and ordinary care and diligence in furnishing its employees reasonably safe roadbed and appliance for the operation of its trains. Railroad Co. *v.* Ryan (Kan. Sup.) 35 Pac. 292; Railway Co. *v.* Needham, 16 C. C. A. 457, 69 Fed. 823; Innes *v.* City of Milwaukee (Wis.) 70 N. W. 1065. The instruction under consideration purported to cover the entire case. It told the jury, if they found certain things to exist, then the plaintiff was entitled to a verdict. Hence the vice in this instruction was not, and could not be, cured by other portions of the charge. Bank *v.* Harshman, 33 Neb. 445, 50 N. W. 328; Bank *v.* Lowrey, 36 Neb. 290, 54 N. W. 568; Barr *v.* State, 45 Neb. 458, 63 N. W. 856; Metz *v.* State, 46 Neb. 547, 65 N. W. 190. My associates are of the opinion that the error was not prejudicial, since no other verdict would have been justified by the evidence. To this view the writer reluctantly yields his assent.

Roadbed—Appliances, etc.—Due Care in Furnishing.

Instruction.

The record shows that, during an intermission of the court, certain jurors in the case visited and examined the locality of the track, switch, and appliances at the scene of the accident, after which they returned to the court room, and the trial proceeded, without the defendant having knowledge of the occurrence. This was a gross irregularity on the part of the jurors, but not sufficient to cause the verdict to be set aside, for reasons now to be stated. The rule is that jurors must base their findings upon the evidence adduced on the trial, and may not make an inspection of the *locus in quo*, unless a view is authorized by the trial court. If a juror, of his own accord, and without permission, visits and makes an inspection of the premises or thing in dispute, it may be sufficient cause for vacating the verdict, but it will not have that effect if it is plain that such examination was not influential in obtaining the verdict. As stated by START, J., in considering the same question in Rush *v.* Railway Co. (Minn.) 72 N. W. 733: "Not every unauthorized view of the *locus in quo* will require the setting aside of a verdict. Considerations of practical justice forbid it. It would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors, or because they were familiar with them. If verdicts were set aside for such reasons, there would be no reasonable limits to litigation, especially in cities, where the opportunities are great for jurors to personally view the locality of the accident under consideration. * * * This rule must be given a reasonable operation, and not applied where there is only a possibility that the result was influenced by the alleged misconduct, but it is to be applied where the court cannot determine with any reasonable certainty whether the result was affected or not." In the case at bar there is no claim made that the plaintiff was guilty of any misconduct in the matter. It is not even suggested that she had any knowledge of the intended action of the jurors. There was no conflict in the evidence, so that a view of the place of the accident would assist those making it to apply the evidence, or determine the credibility of the witnesses. It fully appears from the record that a view, at the time it was taken, could have been of no practical assistance in reaching a conclusion. It could not have influenced or affected the result. It follows that the judgment should be affirmed.

Misconduct of Jurors.

NOTES

Injuries to Employees—Knowledge of Rules.—Where it is claimed by the railroad company that an employee's injuries resulted from his failure to obey certain of its rules, it must be shown, in order that such failure should constitute a defense, that the injured employee had notice or knowledge of the rules. Mackey *v.* Baltimore & P. R. Co., 8 Mackey (D. C.) 282; Central R. & B. Co. *v.* Ryles, 84 Ga. 420, 11 S. E. Rep. 499; Atchison, T. & S. F. R. Co. *v.* Plunkett, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188; Fay *v.* Minneapolis & St. L. R. Co., 11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241; International & G. N. R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. Rep. 681.

Duty to Furnish Safe Track and Machinery—Degree of Care.—In discharging the duty of furnishing its employees a safe track and machinery, and of keeping them in order, it is incumbent upon a railroad company to exercise a reasonable degree of care. Hough *v.* Texas Pacific R. Co., 100 U. S. 213; Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429; Muldowney *v.* Iowa Central R. Co., 39 Iowa, 615; Botsford *v.* Michigan, etc., R. Co. 33 Mich. 256; Palmer *v.* Erie R. Co., 34 N. J. L. 151; Fifield *v.* Northern R. Co., 42 N. J. L. 225; Wright *v.* New York Central R. Co., 25 N. Y. 562; Mullen *v.* Philadelphia, etc., R. Co. 78 Pa. St. 25; Nashville, etc., R. Co. *v.* Jones, 9 Heisk. 27; Brabbito *v.* Chicago, etc., R. Co., 38 Wis. 239; Chicago & Alton R. Co. *v.* Platt, 89 Ill. 141; Cagney *v.* Hannibal & St. Joe R. Co., 69 Mo. 416; Fuller *v.* Jewett, 1 Am. & Eng. R. Cas. 109; Porter *v.* Hannibal & St. Joe R. Co., 2 Am. & Eng. R. Cas. 44; Cone *v.* Delaware, L. & W. R. Co., 2 Am. & Eng. R. Cas. 57; Holden *v.* Fitchburg R. Co., 2 Am. & Eng. R. Cas. 94; Gates *v.* South Minnesota R. Co., 2 Am. & Eng. R. Cas. 237; Kain *v.* Smith, 2 Am. & Eng. R. Cas. 545; Galveston, H. & S. A. R. Co. *v.* Delahanty, 4 Am. & Eng. R. Cas. 628; Little Rock, etc., R. Co. *v.* Duffey, 4 Am. & Eng. R. Cas. 637; Palmer *v.* Denver, etc., R. Co., 6 Am. & Eng. R. Cas. 615; Totten *v.* Pennsylvania R. Co., 6 Am. & Eng. R. Cas. 616; Painter *v.* Northern Central R. Co., 5 Am. & Eng R. Cas. 454; Lake Shore, etc., R. Co. *v.* McCormick, 5 Am. & Eng. R. Cas. 474; Pittsburgh, etc., R. Co. *v.* Sentmeyer, 5 Am. & Eng. R. Cas. 505; Herbert *v.* Northern Pac. R. Co., 8 Am. & Eng. R. Cas. 85; Louisville & N. R. Co. *v.* Orr, 8 Am. & Eng. R. Cas. 94; Umback *v.* Lake Shore & M. S. R. Co., 8 Am. & Eng. R. Cas. 98; Baker *v.* Allegheny Valley R. Co., 8 Am. & Eng. R. Cas. 141; Missouri Pacific R. Co. *v.* Lyde, 11 Am. & Eng. R. Cas. 188; Fay *v.* Minneapolis & St. L. R. Co., 11 Am. & Eng. R. Cas. 193; Atchison, T. & S. F. R. Co. *v.* Holt, 11 Am. & Eng. R. Cas. 206; Chicago & E. Ill. R. Co. *v.* Rung, 11 Am. & Eng. R. Cas. 218; Lake Erie & W. R. Co. *v.* Everett, 11 Am. & Eng. R. Cas. 221; East. Tenn., Va. & Ga. R. Co. *v.* Toppins, 11 Am.

& Eng. R. Cas. 222; Atchison, T. & S. F. R. Co. *v.* Moore, 11 Am. & Eng. R. Cas. 243; Wilson *v.* Denver, S. P. & P. R. Co., 15 Am. & Eng. R. Cas. 192; Solomon R. Co. *v.* Jones, 15 Am. & Eng. R. Cas. 201; Guthrie *v.* Louisville & N. R. Co., 15 Am. & Eng. R. Cas. 209; Leahy *v.* Southern Pacific R. Co., 15 Am. & Eng. R. Cas. 230; Richmond & D. R. Co. *v.* Moore's Adm'r, 15 Am. & Eng. R. Cas. 239; Brown *v.* Atchison, T. & S. F. R. Co., 15 Am. & Eng. R. Cas. 271; Louisville, etc., R. Co. *v.* McCoy, 15 Am. & Eng. R. Cas. 277; Texas & P. Ry. Co. *v.* Barrett (U. S.), 11 Am. & Eng. R. Cas., N. S., 867; Chesapeake & O. R. Co. *v.* Lash's Adm'r (Va., 1896), 3 Am. & Eng. R. Cas., N. S., 569.

CHATTANOOGA ELECTRIC RY. CO.

v.

LAWSON *et al.*

(*Supreme Court of Tennessee, Oct. 22, 1898.*)

Assignments of Error.—If there is no objection to the charge, to state in an assignment of error that the verdict is against the charge is equivalent to stating that it is against the evidence.

Section Boss—Vice Principals.*—A section boss or track foreman stands in the relation of vice principal to one of a gang of track hands under his orders.

Boarding Moving Train—Contributory Negligence—Question for Jury.†—It is not contributory negligence *per se* for a track hand, in obedience to an order from his section boss, to attempt to board a train of flat cars moving up grade at the rate of three or four miles an hour.

Negligence of Vice Principal.—It was the duty of such vice principal to control the train, and he was acting as conductor and motorman when he gave such order. *Held*, that he was acting as vice principal in regard to both the management of the train, and the giving of the order; and the jury were warranted in finding that his failure to stop the train before and after deceased caught the car was negligence.

APPEAL by defendant from Hamilton county circuit court. *Affirmed.*

*See Illinois Cent. R. Co. *v.* Bolton (Tenn.), 9 Am. & Eng. R. Cas., N. S., 868, and *foot-note*.

†See note at end of case.

Chattanooga Electric Ry. Co. *v.* Lawson

Brown & Spurlock, for appellant.

Marchbanks & Mathews, *J. T. Mathews*, and *W. T. Murray*, for respondents.

SNODGRASS, C. J. Suit by children for damages for the negligent killing of their father. Declaration has two counts; first averring general negligence of the railway company, and second negligence resulting in giving sudden order obeyed in an emergency. There was another count, for associating deceased with incompetent fellow servants, but this was abandoned. Judgment for plaintiffs for $6,000, motion for new trial overruled, and appeal in error.

There are three assignments of error,—no evidence to sustain the verdict, objection to charge given by the court and refused, and excessive damages. The errors assigned also include statement that the verdict was "contrary to the charge of the court," but this is superfluous. It can and does mean only that it is against or not supported by any evidence. If a charge is correct, and there is a verdict without evidence, it is, of course, "against the charge." Therefore, if the charge is satisfactory, the objection that there is no evidence to sustain the verdict necessarily implies that it is "against the charge."

Assignments of Error.

The court had charged correctly that, to justify effort to obey order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency. There was no such immediate order, and plaintiffs were not entitled to recover on that account. If entitled at all, it must be for negligence not thus specifically averred; and the whole case turns upon one point,—whether, under the evidence, the track foreman, by whose negligence the injury, it is claimed, was occasioned, was the superior of deceased, in the sense of a vice principal, and was or not his negligence, if proven, personal or official. The plaintiff in error makes through its counsel a lengthy and learned argument to show that such a superior does not so represent the principal as to charge it with responsibility, and cite many cases to that effect. It attempts also to show that, when properly analyzed, the Tennessee cases are now in accord with this view. In this, counsel are in error. Whatever the doctrine may be elsewhere, it is clear that in this state a section boss or track foreman is a vice principal, and for his negligence while acting officially for the master the master is answerable. This has been too long

Section Boss—Vice Principals.

settled even to need statement, much less citation of cases.

The only question is whether the negligence was personal or official. Lawson, who was killed, was one of a gang of track hands. He was a subordinate under Nave, the track foreman. Lawson was working with other hands on the track, under the control and orders of Nave, who that day and for some days previous had been running a trolley car and flat car attached, carrying tools and materials over the road, depositing the latter about a quarter of a mile beyond where the deceased was working. Nave was controlling the cars, and was in charge of the motor, acting as conductor and motorman. He had the right to order deceased on or off the cars. Evidence believed by the jury (and that is taken as conclusive here, after verdict and judgment) shows that he commanded deceased, who was a subforeman, to take four or five men, catch the cars as they would pass, and go to their destination, and unload. It was upgrade, and he would not stop. This deceased had done on several trips. On the one in question, and while the cars conducted by Nave were going at the rate of three or four miles an hour, he attempted, in obedience to order before given, to get onto the front platform, caught on an iron rod or hand railing about the platform, slipped, and was swung around in front of the car. He held on for some distance, somewhere from 15 to 45 feet, and then fell on the track, was run over and killed, both cars passing over his body, and some car lengths beyond. There is evidence tending to show that Nave could have stopped the cars from the time he swung round until he fell. Of course, there is evidence to the contrary; but here, after verdict, the case must be put upon the strongest evidence, and upon this it must be determined whether there was any evidence to sustain the verdict. We are of opinion that there is evidence to sustain it. The danger of the effort to get on was not, at most, very great, and it cannot be said as a matter of law that it would prevent recovery. The question was one for a jury, as well as its effect (if not the proximate cause of the death), in mitigation of damages. The charge was full and fair on both points, and there is no reversible error either in the fact or amount of the verdict.

Boarding Moving Train—Contributory Negligence—Question for Jury.

This leaves for determination the question as to whether the negligence of the foreman was official, in contradistinction to personal, and we are of opinion that it was. It was Nave's duty to control the cars. At least it appears to have been assigned to

Negligence of Vice Principal.

Note

him, for he had been for some time doing it, and there is no evidence that any other conductor or motorman ever did this during that work, and it was also his duty to order the men on and off of the cars. What he did or omitted to do, therefore, if negligent, was the master's negligence. He was running by there without stopping before or after deceased caught the car, having given orders to board them while in motion. The jury had the right to find this was negligence, and that it was official.

The charge of the judge is complained of that he did not instruct the jury that, upon the facts, it would only have been in the capacity of a fellow servant that Nave was acting, and that the court's charge omitted to distinguish between personal and official negligence, in a paragraph quoted in the brief. Waiving the question as to whether the charge could be looked to at all, it not appearing to have been signed, it is sufficient to say that it would have been error to have given the instruction asked; and as to objection to the paragraph quoted, as supposed error, the omission is supplied in another paragraph of the charge, in which the judge refers to the "superior" as necessary to be one "standing in the place of the master." Railroad Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211. But this is wholly immaterial. In this case, upon the facts, the track foreman was a vice principal; and whether the court went into such distinction as to personal or official negligence (when he referred only to negligence) is not important. It could not be reversible error in a case in which the distinction was not called for. Judgment affirmed.

NOTE.

Servant Obeying Order Exposing Him to Unusual Dangers—Contributory Negligence.—In order that a servant may be guilty of contributory negligence in complying with an order of the master which causes him to run the risk of a danger that is unusual and unexpected and not in his line of duty, he must fully realize the danger, and the attendant peril must be so obvious and imminent as that it is apparent to a person of ordinary prudence.

England.—Clayards *v.* Dethick, 12 Q. B. 439, 64 E. C. L. 439; Roberts *v.* Smith, 2 H. & N. 213; Thrussell *v.* Handyside, 20 Q. B. Div. 359; Heaven *v.* Pender, 11 Q. B. Div. 503; Thomas *v.* Quartermaine, 17 Q. B. Div. 414; Yarmouth *v.* France, 19 Q. B. Div. 647; Woodley *v.* Metropolitan Dist. R. Co., 2 Exch. Div. 384; Wiggett *v.* Fox, 11 Exch. 832; Collis *v.* Selden, L. R. 3 C. P. 495.

Note

United States.—Union Pac. R. Co. *v.* Fort, 17 Wall (U. S.) 553; English *v.* Chicago, etc., R. Co., 24 Fed. Rep. 906; Anderson *v.* Winston, 31 Fed. Rep. 528; Finley *v.* Richmond, etc., R. Co., 59 Fed. Rep. 419; Thompson *v.* Chicago, etc., R. Co., 4 McCrary (U. S.) 629, 14 Fed. Rep. 564.

Alabama.—Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Arkansas.—St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 44 Am. & Eng. R. Cas. 541.

Georgia.—Baker *v.* Western, etc., R. Co., 68 Ga. 699; Western, etc., R. Co. *v.* Adams, 55 Ga. 279; Bell *v.* Western, etc., R. Co., 70 Ga. 566.

Illinois.—Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401, 4 Am. Rep. 616; Fitzgerald *v.* Honkomp, 44 Ill. App. 365; Chicago, etc., R. Co. *v.* May, 108 Ill. 288; Honner *v.* Illinois Cent. R. Co., 15 Ill. 550; Illinois Cent. R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298.

Indiana.—Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 23 Am. & Eng. R. Cas. 408; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; Hawkins *v.* Johnson, 105 Ind. 29, 55 Am. Rep. 169, and *note*; Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, 48 Am. & Eng. R. Cas. 309; Louisville, etc., Consol. R. Co. *v.* Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 53 Am. & Eng. R. Cas. 452.

Iowa.—Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 Am. & Eng. R. Cas. 430; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357; Peterson *v.* Whitebreast Coal, etc., Co., 50 Iowa 673, 32 Am. Rep. 143; Light *v.* Chicago, etc., R. Co., 93 Iowa 83.

Kansas.—Atchison, etc., R. Co. *v.* Schroeder, 47 Kan. 315.

Kentucky.—Bradshaw *v.* Louisville, etc., R. Co., (Ky. 1893) 21 S. W. Rep. 346.

Maine.—Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 31 Am. & Eng. R. Cas. 272, 1 Am. St. Rep. 321.

Massachusetts.—Haley *v.* Case, 142 Mass. 316; Taylor *v.* Carew Mfg. Co., 140 Mass. 150; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, 52 Am. Rep. 733, 23 Am. & Eng. R. Cas. 383; Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 34 Am. St. Rep. 275; Gagnon *v.* Seaconnet Mills, 165 Mass. 221.

Michigan.—Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 208; Broderick *v.* Detroit Union R. Station, etc., Co., 56 Mich. 261, 56 Am. Rep. 382.

Minnesota.—Myhre *v.* Tromanhauser, 64 Minn. 541; Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, 41 Am. & Eng. R. Cas. 269.

Mississippi.—New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356; Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404.

Missouri.—Keegan *v.* Kavanaugh, 62 Mo. 230; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285, 28 Am. & Eng. R. Cas. 528; Cummings *v.* Collins, 61 Mo. 520; Beard *v.* American Car Co., 63 Mo. App. 382.

Nevada.—Patnode *v.* Harter, 20 Nev. 303.

New York.—Lofrano *v.* New York, etc., Water Co., 55 Hun (N. Y.) 452; Ross *v.* New York Cent., etc., R. Co., 5 Hun (N. Y.) 488; Thompson *v.* Ross, 58 Hun (N. Y.) 608, 35 N. Y. St. Rep. 273, 12 N. Y. Supp. 151; Tonneson *v.* Ross, 58 Hun (N. Y.) 415; Wooden *v.* Western New York, etc., R. Co., 5 N. Y. Misc. Rep. (Buffalo Super. Ct.) 537; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Connolly *v.* Poillon, 41 Barb. (N. Y.) 366; Keenan *v.* New York, etc., R. Co., 2 N. Y. Misc. Rep. (Buffalo Super. Ct.) 34.

Pennsylvania.—Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Campbell *v.* Pennsylvania R. Co., (Pa. 1886) 2 Atl. Rep. 489, 24 Am. & Eng. R. Cas. 427, and *note*.

Rhode Island.—Mann *v.* Oriental Print Works, 11 R. I. 152.

Tennessee.—East Tennessee, etc., R. Co. *v.* Duffield, 12 Lea (Tenn.) 63, 47 Am. Rep. 319, 18 Am. & Eng. R. Cas. 35; Guthrie *v.* Louisville, etc., R. Co., 11 Lea (Tenn.) 372, 47 Am. Rep. 286, 15 Am. & Eng. R. Cas. 209.

Texas.—Texas, etc., R. Co. *v.* French, (Tex. Civ. App. 1893) 22 S. W. Rep. 866; Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452, 8 Am. & Eng. R. Cas. 504.

Utah.—Harrison *v.* Denver, etc., R. Co., 7 Utah 523.

Virginia.—Norfolk, etc., R. Co. *v.* Ward, 90 Va. 687, 44 Am. St. Rep. 945.

Wisconsin.—Thompson *v.* Edward P. Allis Co., 89 Wis. 523; Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, 33 Am. & Eng. R. Cas. 274, 5 Am. St. Rep. 201.

CHICAGO & A. RY. CO.

v.

SWAN.

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Injury to Baggage Master—Fellow Servants—Pleading.—In an action against the railroad company by its baggage master for personal injuries alleged to have resulted through the negligence of the engineer in running the train, it is not necessary that the declaration should allege that such employees were not fellow servants.

Same—Same.—The engineer of a passenger train and its baggage master are not, *per se*, fellow servants.

Same—Same.*—A baggage master who has no other duties on the train than the usual duties of such an employee, is not a fellow servant of the engineer of the train, where the question involved is whether the master is liable for personal injuries sustained by the baggage master through the negligence of the engineer in running the train.

APPEAL by defendant from First district appellate court. *Affirmed.*

Monroe & Thornton (*William Brown*, of counsel), for appellant.

F. H. Trude (*Dennis & Rigby*, of counsel) for appellee.

WILKIN, J. The first and principal contention of counsel for appellant is that the declaration is insufficient to sustain the judgment. It is objected that it fails to allege that the plaintiff and the engineer, through whose negligence it is claimed he was injured, were not fellow servants. Such an averment was unnecessary. Cribben *v.* Callaghan, 156 Ill. 549, 41 N. E. 178; Railroad Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534; Libby, McNeill & Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801. The facts showing the relation of the parties are stated in the declaration. It is never necessary to aver mere matters of conclusion. Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161.

Injury to Baggage Master—Fellow Servants—Pleading.

But it is said the facts so alleged show the relation of fellow servants to have existed. This position is only tenable, if at all, upon the ground that the engineer of a passenger train and the baggage master on the same are, *per se*, fellow servants at all times and under all circumstances, which is not true. Taking the rule in this state for determining whether employees are fellow servants, in the sense which will relieve the common master from liability for an injury to one through the negligence of the other, to be as quoted in Railroad Co. *v.* Kneirim 152 Ill. 458, 39 N. E. 324, two tests of the master's liability under that rule are assumed to exist: First, "where they are directly co-operating with each other in a particular business in the same line of employment"; and, second, "where their duties are such as to bring them into habitual association, so that

Same—Same.

*See note at end of case.

they may exercise a mutual influence upon each other promotive of proper caution." As thus construed, the qualifying words, "so that they may exercise a mutual influence upon each other promotive of proper caution," have no application to the first, but are limited entirely to the second. Under this construction, and further assuming that an engineer and a baggageman on the same train do, as a matter of law, directly co-operate with each other in the business of running the train, in the same line of employment, the conclusion is reached that plaintiff and the engineer who negligently injured him are shown by the declaration to have been fellow servants of the defendant. Whatever may be said of the correctness of the construction, tested by strict grammatical rules, it is unsound in law, under the decisions of this court. The reason for the rule, definitely settled in this state since the Moranda Case, 93 Ill. 302, is wholly inconsistent with the restricted construction here contended for, as shown by the cases cited in the opinion of the appellate court by JUSTICE GARY.

We do not understand that the Kneirim Case, *supra*, or Leeper *v.* Railroad Co., 162 Ill. 215, 44 N. E. 492, in view of the matters there under consideration, conflict with this conclusion. The quotation from 53 Ill. 336, in the Leeper Case, was perhaps unnecessary, and more liable to mislead than make clear the point under consideration, but it sufficiently appears from the whole opinion that it was not intended, by the use of that language, to give a definition of the term "fellow servant." The same language had been criticised as such a definition in the Moranda Case, and was well understood as not conforming to the rule then announced and since adhered to.

Neither do we assent to the view that, under the facts stated in this declaration, plaintiff and the engineer in charge of the locomotive drawing the train were necessarily fellow servants, even under the rule as interpreted by counsel. Whether different servants of the same master are "fellow servants," within the legal signification of that term, is a question of fact, to be determined by the jury from all the circumstances of each case. Railroad Co. *v.* Massey, 152 Ill. 144, 38 N. E. 787; Railroad Co. *v.* Hawthorn, *supra*; Railroad Co. *v.* House, 172 Ill. 601, 50 N. E. 151; Railroad Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453. The definition of "fellow servants" is a question of law. Whether a given case falls within that definition is a question of fact. See

the foregoing cases, and also Mining Co. *v.* Grogan, 169 Ill. 50, 48 N. E. 190, and Bridge Co. *v.* Walker, 170 Ill. 550, 48 N. E. 915. In determining whether the relation exists, it is often necessary to determine many facts, some of which are recited in the opinion in the Morgenstern Case, 106 Ill. 216.

It is difficult to see upon what theory it can be held that a baggageman, as such, has any control over the movements of the train upon which he is employed, or anything to do with the running of the same. Proof that one was a baggageman and the other an engineer would, of itself, justify the inference that they were not directly co-operating with each other in the business of running the train, and hence not fellow servants, under our rule. But in this case the plaintiff testified that his duties as baggageman were to handle baggage and railroad letters, and anything of that kind pertaining to railroad business in his car; that he had nothing to do outside of the car, and that the conductor or engineer had no control over him in the performance of his duties; also that he was hired by the general baggage agent, and instructed that his place was in the baggage car; that he had never been required to get out and perform other duties for the trainmen, and that it was not the custom for baggagemen to do so. There was, as a matter of fact, no co-operation between him and the engineer. The declaration sustains the judgment, and the evidence supports the allegations of the declaration.

Same—Same.

We have not, in the view taken of the case, deemed it important to inquire whether the objections urged against the declaration could be made after verdict, and without a motion in arrest of judgment, or whether the question of the sufficiency of the evidence to sustain the plaintiff's cause of action was properly preserved in the record as one of law, so as to be reviewable in this court.

It is urged that the trial court erred in giving the fourth and fifth instructions on behalf of the plaintiff, and refusing the third and fifth asked by the defendant. We think the fourth and fifth were properly given under the facts of the case, and were fair, to say the least, for the defendant. The third of defendant's instructions was substantially given in another asked by it. The fifth was properly refused, because it assumed that a baggageman and engineer on the same train are, as a matter of law, fellow servants. We have examined the instructions given to the jury both for the plaintiff and

defendant, and are convinced that the defendant has no just grounds of complaint in that regard.

Other objections are made to the ruling of the circuit court on the trial, but we do not regard them as of substantial merit. We find no reversible errors of law in the record. The judgment of the appellate court must be affirmed. Judgment affirmed.

NOTE.

Fellow Service—Servants in Different Departments.—It is not the law that a master is released from liability in all cases in which a servant is injured by the negligence of a fellow-servant. The master's immunity is limited to cases where the servants are engaged in the same common employment—*i. e.*, in the same department of duty; but it does not extend to cases where the servants are engaged in departments essentially foreign to each other. King *v.* Ohio & M. R. Co., 8 Am. & Eng.R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277; Kielley *v.* Belcher Silver Min. Co., 3 Sawy. (U. S.) 437; Pittsburg, Ft. W. & C. R. Co. *v.* Powers 74 Ill. 341; Louisville & N. R. Co. *v.* Sheets, (Ky.) 41 Am. & Eng. R. Cas. 704, 13 S. W. Rep. 248; Union Pac. R. Co. *v.* Billeter, 41 Am. & Eng. R. Cas. 431, 28 Neb. 422, 44 N. W. Rep. 483; Richmond & D. R. Co. *v.* Norment, 84 Va. 167, 4 S.E. Rep. 211; Madden *v.* Chesapeake & O. R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

A servant cannot be held to have contemplated in the adjustment of his wages those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. King *v.* Ohio & M. R. Co., 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277.

BATEMAN

v.

PENINSULAR RY. CO.

(*Supreme Court of Washington, Nov. 4, 1898.*)

Injury to Employee—Fires—Negligence.—A railroad company permitting forest debris to accumulate around a bridge, with knowledge of the danger of forest fires, is liable for the death of a fireman killed

*See notes at end of case.

in the fall of a locomotive through a burning trestle of such bridge, ignited through forest fires.

Fellow Servants.*—A locomotive fireman and a section foreman are not fellow servants.

Negligence of Vice Principal.—A superintendent of a railroad company, being notified by a county road superintendent that a fire was raging on the road, and taking no steps to notify an approaching train, is guilty of negligence, where the locomotive of the train falls through a burning bridge, and the fireman is killed.

APPEAL by defendant from Mason county superior court. *Affirmed.*

Bausman, Kelleher & Emory, for appellant.

Young & Day and *W. B. Dillard*, for respondents.

DUNBAR, J. Bateman, a locomotive fireman, was killed in the fall of a locomotive through a burning trestle. The complaint alleges carelessness and negligence of appellant in maintaining its line of track and trestles, negligence in allowing the trestle to catch fire, and in permitting driftwood to accumulate about it, and forest debris, in failing to inspect its line of track, and in failing to protect the deceased from accident and injury, though it knew of the dangerous condition, and though its section foreman, to whom it delegated the performance of said duty, knew of said danger. The company was also charged with negligence in failing to furnish the deceased a reasonably safe place to labor.

Case Stated.

A demurrer was interposed to the complaint, to the effect that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and, upon the trial of the cause, judgment was rendered for $5,000 in favor of the respondent. The answer denied negligence, and affirmatively charged Bateman with assuming the risks of a fireman, and with contributory negligence, and alleges that the accident was caused by the act of a fellow servant. We think there is no question but that the demurrer was properly overruled, and the main question under consideration is that of the liability of fellow servants, motion for nonsuit having been made upon the ground that the negligence, if any, was that of a fellow servant.

Injury to Employee—Fires—Negligence.

Appellant alleges as error the refusal of the court to give the following instruction, No. 6 of defendant's requested

instructions: "I instruct you, gentlemen, as a matter of law, that if you shall find that the accident causing death of the deceased, Bateman, arose from the neglect of the defendant company's section foreman on the track, and that the ordinary occupations of deceased, Bateman, and of the section foreman, in their respective service, bore such relations to each other that the careless or negligent conduct of the section foreman (if any such careless or negligent conduct on his part you shall find) endangered the safety of deceased, Bateman, then such danger was incident to the employment of the deceased, Bateman, and his representatives, the plaintiffs, cannot recover;" and the next instruction, No. 7, which involves substantially the same principle. We think these instructions were properly refused. It is true that in Railroad Co. *v.* Murphy, 53 Ill. 336, a case from which the instruction in question was evidently taken, said instruction was sustained by the court under a state of facts somewhat different from the facts involved in this case. But in a later case, *viz.* Railroad Co. *v.* Moranda, 93 Ill. 302, this instruction was specifically overruled. In that case it was said: "In the case of Railroad Co. *v.* Murphy, 53 Ill. 336, it was said: 'When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be regarded as fellow servants, within the meaning of the rule which exempts the common master from liability in cases of this character.' This language was referred to with approbation in the case of Valtez *v.* Railway Co., 85 Ill. 500; but, as a definition of what shall constitute fellow servants in this class of cases, it is regarded as laying down the rule too broadly, and is disapproved." And in that case it was held that "where a servant of a railway company, whose duty it was, with others, to repair and keep in order a section of the road, while engaged in such duty, and standing some five or six feet from the rail of the track, to avoid a passing train, was struck on the head by a large lump of coal which was carelessly cast by the fireman of the train from the tender, from the effects of which the person injured died," "the company was liable to his personal representatives for damages, under the statute. The track repairer and the fireman on the passing train were not regarded as fellow servants, within the rule." It would seem that this announcement of the law was squarely opposed to the contention of the appellant in this action.

But it is not necessary to recur to decisions of other states on this question, for, while it is conceded that the authorities on the proposition involved are conflicting, the many cases decided by this court have settled the rule contrary to appellant's contention. In Zintek *v.* Mill Co., 9 Wash. 395, 37 Pac. 340, it was held that "the yard boss of a lumber yard, whose duty it is to superintend the piling of lumber therein, and direct the workmen engaged in said work, who are subject to his order and control, stands in the position of a vice principal, instead of a fellow servant, of such workmen, although he may occasionally perform services as tallyman in measuring lumber, and although his authority to hire and discharge men is subject to the approval of the general superintendent." In McDonough *v.* Railway Co., 15 Wash. 244, 46 Pac. 334, it was held that "a foreman in charge of railway construction work, with authority to employ and discharge workmen, and direct them in the performance of their work, and who is the sole representative of the company at the place or within miles thereof, stands in the position of a vice principal, although it may be the duty of such foreman to receive orders from, and report to, the roadmaster, whose headquarters were at a considerable distance from the place of work." In that case, Nolan, the roadmaster, was held responsible for the explosion of a blind blast, which was unknown to respondent at the time of its explosion, which was the cause of the accident. There an instruction to the effect that if one servant was placed in the position of control, authority, and direction over the whole work of the master, or over some general, separate, or distinct branch thereof, he would not be a fellow servant with the other servants employed, was held by this court to be a proper statement of the law; and the case of Railway Co. *v.* Ross, 112 U. S. 377, 5 Sup. Ct. 184, was quoted, to the effect that a conductor of a railroad train, who has the right to command the movements of the train, and to control persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow servant to the engineer and other employees of the corporation on the train.

In this case the evidence shows conclusively that Sheedy, the section foreman, had under his control the keeping in repair and in safe condition the section of road over which this train ran. This was in no sense a common employment with the fireman, whose duties were specified, and had no reference to the road. He had a

Fellow Servants.

right to rest upon the assumption that the company would provide him a safe road over which the engine could be projected. It was the duty of the company to provide this safe road, and this proposition is not controverted by the appellant. The company could maintain the safety of this road only through agents. Its agents are its employees. This agent, the section foreman, was clothed by the company with authority to do this duty; and it has often been said by this court and other courts that, where a duty is imposed upon a corporation, it cannot escape the liability incurred by failing to perform that duty by deputing the duty to others. In Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518, where failure to keep the roadbed in repair caused the death of the engineer, the following instruction was alleged as error, but was sustained by this court: "It is the duty of the railway company to see that due and reasonable care is used in the inspection of its roadbed, ascertaining its condition, and in keeping it in repair. If, therefore, you find from the evidence that the roadbed at the place of injury was out of repair, and the ties rotten, and that this bad repair and rotten condition of the ties caused the injury; and if you further find that the receiver of the railroad company, or his agents in charge of the track department of the road, knew of the bad condition of the track, or could have ascertained its bad condition by a reasonably careful inspection, long enough prior to the accident to have repaired the same; and if they were negligent and careless in failing to inspect the road, and that negligence and carelessness caused the injury, without fault or negligence on the part of Robert Walker,—then the plaintiffs can recover. It is the duty of the railroad company, or its receiver, to keep its track in repair, so that it is safe for the kind of engines and rolling stock that it sends over it, so far as reasonable care and prudence will make it so." It seems to us that this instruction would have been exactly applicable to this case. While there, it is true, the injury was caused by the negligence of the agent of the company who was in charge of the track department, in allowing the ties to become unsound, and here the agent of the company, who was in charge of the track department, allowed the road to become unsafe by reason of a fire consuming a trestle over which the engine had to pass, there is no difference in principle between the two cases. But the facts in this case show possibly a more flagrant dereliction of duty on the part of the railroad company than in the case quoted,

for here it is shown that the company's attention had been called to the danger of forest fires, and that it had allowed forest debris to accumulate around the bridges to such an extent that conflagration was made easy, and, under the circumstances, probable. Again, this court, in Hammarberg *v.* Lumber Co. (decided June 22, 1898) 53 Pac. 727, in reviewing the authorities on this subject, quoted approvingly the case of Cooper *v.* Mullins, 30 Ga. 146, where it was held that none are deemed to be in a common employment who have no opportunity to use precautions against each other's negligence; and Sadowski *v.* Car Co. (Mich.) 47 N. W. 598, where the court said: "The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliance when provided, and that they are not therefore, as to each other, fellow servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." We are satisfied with the rule announced in Hammarberg *v.* Lumber Co., *supra*; and, applying the law there announced to the facts in this case, we find no error in refusing the instruction asked for. The section foreman here was intrusted by the company to look after the safety of the tract, and this constituted him the agent or vice principal of the company. In addition to this, a knowledge of the danger to which this train was subjected was brought directly home to the superintendent of the company. He was notified by a county road superintendent, about 2½ hours before the accident occurred, that a fire was raging on the road; and yet he did not send any one to notify the train, which he knew was approaching, of the danger, or go himself in time to reach the dangerous point until after the accident.

Negligence of Vice-Principal.

It is insisted by the appellant that the evidence was not sufficient to establish negligence on the part of the superintendent; but we think, when the proof was introduced that notice was given, and a reasonable time had elapsed after such notice was given to prevent the accident, and that such notice had not been acted upon by the superintendent, this was sufficient proof, unexplained, of negligence. The judgment is affirmed.

GORDON and REAVIS, JJ., concur.

NOTES.

Section Foreman Not Fellow Servant of Trainmen.—A section foreman, with respect to the duty of keeping the track in a safe condition, is not a fellow servant with trainmen. Mobile & M. R. Co. *v.* Smith, 59 Ala. 245; St. Louis & S. F. R. Co. *v.* Weaver, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408; Lewis *v.* St. Louis & I. M. R. Co., 59 Mo. 495, 8 Am. Ry. Rep. 450; Hall *v.* Missouri Pac. R. Co., 8 Am. & Eng. R. Cas. 106, 74 Mo. 298; Calvo *v.* Charlotte, C. & A. R. Co., 28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28; Hulehan *v.* Green Bay, W. & St. P. R. Co., 31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 529.

Criterion of Fellow Service.—See Norfolk & W. R. Co. *v.* Houchen's Adm'r (Va.), 8 Am. & Eng. R. Cas., N. S., 616, and *note* by Mr. McKinney, p. 630.

KNOT

v.

SOUTHERN RY. CO.

(*Supreme Court of Tennessee, Oct. 15, 1898.*)

Injury to Employee—Fellow Servants.*—A foreman of a gang of wipers is not a vice principal with respect to the wipers whom he directs as to when and where to work, but their fellow servant.

Case at Bar—In an action for the death of a wiper, resulting from the starting of the engine while he was beneath it, it appeared that the usual warning had been given, that the boss wiper had ordered the wipers to leave the engine house, and that deceased, an experienced wiper, was negligent in not leaving before the engine was started; and it was not shown that it was the duty of the boss to look under the engines before they were started. *Held*, that the demurrer to the sufficiency of the evidence was properly sustained.

APPEAL by defendant from Knox county circuit court. *Affirmed.*

N. N. Osborne, *W. H. Shaver*, and *Carnack*, *Sansom & Carnack*, for appellant.

Jouralman, *Welcker & Hudson*, for appellee.

*See Martin *v.* Atchison, T. & S. F. R. Co. (U. S.), 6 Am. & Eng. R. Cas., N. S., 600; Gavigan *v.* Lake Shore & M. S. Ry. Co. (Mich.), 5 Am. & Eng. R. Cas., N. S., 523 and *notes*, p. 530 *et seq.*

WILKES, J. This is an action for personal injuries resulting in the death of the husband of plaintiff. Upon the trial, the plaintiff introduced her evidence, and the defendant demurred to the same. There was joinder in the demurrer, and, on hearing, the court sustained it, and dismissed the suit at plaintiff's cost, and she has appealed.

Case Stated.

The judgment upon the demurrer recites that, if there was negligence of a third person causing the death, it was that of a fellow servant, for which the principal is not liable. It appears that the deceased was an old man, and was employed as a hostler or engine wiper. His duty was to wipe off the underside of the engines as they stood in their stalls in the engine house, over a pit dug out for this purpose. He was so engaged just previous to the accident. The proof shows that a wiper can get into the pit under the engine while it stands in its stall, and wipe off the underpart of the engine. In order to reach some of the higher parts, it is necessary for him to climb up among the underworks of the engine. There were a number of stalls in the roundhouse, and a number of wipers employed, some to wipe the outside, and some "underwipers," to clean under the engines. The deceased was one of the latter. Over the wipers was a boss. The other wipers work under his direction. It was his duty to give the men their orders, look after the engines, and see when they are ready to be moved out of the roundhouse. It was his duty to see if there was anything on the track, open the doors of the engine house, and give signals for the engines to move out, and to give orders for the men to adjust the turntables. This injury occurred at night. The deceased had been wiping the underside of an engine. Another engine was standing near, on an adjoining track, also being wiped. The deceased had a lantern lighted with him under his engine. It was found after the killing, in the pit, sitting on the ground. Deceased had been doing this work for 14 months, working in the night, and sleeping in the daytime. There was a turntable just outside the doors of the engine house, on which each engine went in entering and leaving the house, so as to get the proper direction or track. It appears that this engine was moved out, the doors or the room were open, the bell rung, the engineer got upon his engine, and the boss wiper ordered the men out to the turntable to adjust it. This was turned in the proper position, and the steam was applied, and engine moved out to the table. It stopped some seconds

before it reached the turntable, until the table could be adjusted. When the engine proceeded to back off the table, the end at which it went off was depressed, and the other end tilted up somewhat; and just at this time, while the pilot of the engine was passing near the center of the turntable, cries of distress were heard. The engine passed off, and deceased was discovered about the center bolt or pin of the turntable, between the rails of the track. His legs were broken, and the body badly mangled. He died soon afterwards from his injuries.

The first question is whether the "boss wiper," as he is called in this case, was a superior servant to the deceased, in the sense that he stood as a vice principal, representing the master, at the time and in the matter of this accident. The boss wiper was evidently the foreman of the gang of wipers, and directed them when to work and what to do. It does not appear that he had any power to employ or discharge them. He had certain duties of his own to perform, which may be termed of a higher grade or dignity than that of an ordinary wiper; such as opening the doors, giving the signal for the moving of the engines, ordering the hands to go to and adjust the turntable. It does not follow because a servant is a "foreman" that he is a vice principal, so as to make the latter responsible for his negligence; but he must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior servant which, under the law, the master owes the servant. Allen *v.* Goodwin, 92 Tenn. 387, 21 S. W. 760, and cases there cited. We do not think that the boss wiper, in discharge of his duty, stands in the place and stead of the master as to the wipers, but as their fellow servant, albeit he is their foreman, and directs them when and where to work.

Injury to Employee—Fellow Servants.

But, even if he be considered as a vice principal, we cannot see in what respect he was negligent upon this occasion. It is not shown that it was one of his duties to look under the engines, and ascertain whether a wiper may be under it, before he gives the signal for it to leave the engine house. The wiper is presumed to know something of the movements of the engine himself, and to be on the lookout for its starting. In addition, the engineer rings the bell before starting, as a warning; and this was shown to have been done. In addition, in this instance the boss had ordered the wipers out to the turntable; and, if in the

Case at Bar.

line of his duty, the deceased should have gone then. Instead of this, he was evidently up among the rods and beams, on the underside of the engine, when it started; and, though it stopped before it reached the turntable, the deceased made no effort to leave his place of danger, and made no outcry. The unavoidable inference is that he must have been asleep, or, if awake, reckless in his conduct in remaining where he was until he was crushed by the centerpiece of the turntable in passing over it. We do not see how upon any hypothesis the railroad could be held liable for such accident; and the circuit judge was correct in sustaining the demurrer and dismissing the suit, and his judgment is affirmed, with costs.

MORBEY

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, April 7, 1898.*)

Death of Employee—Negligence of Fellow Servant—Direction of Verdict.—In an action for the negligent killing of an employee, the evidence tended to show that the accident resulted from the incompetency of another employee, a clinker puller, who was running an engine for practice; that the latter had no right to run an engine, and had previously been expressly forbidden to do so, though other clinker pullers habitually ran engines, and were not forbidden to run them by defendant's foreman having authority to stop such violation of the rules; that a fellow servant might have prevented the accident; and that the jury were not authorized to presume that deceased was guilty of contributory negligence. *Held*, that the direction of a verdict for defendant was properly refused.

Same—Burden of Proof.—In such action it was prejudicial error to give an instruction from which the jury could infer that the burden was on defendant to show that the clinker puller had no authority to run an engine and that defendant had no knowledge that he ran engines, it having been shown that the duties of such clinker puller did not require him to run engines.

Instructions—Assumptions of Fact.—A charge is erroneous which

contains assumptions of fact by the court not warranted by the evidence.

Same —Scope of Employment.—It was error to refuse to instruct, as requested, that a clinker puller has not by implication authority to move engines.

Same.—It was not error to refuse to instruct, in substance, that the fact that defendant's foreman knew that the clinker pullers did at times move engines did not tend to prove that they were authorized to move them.

APPEAL by defendant from Clinton county district court. *Reversed.*

Hubbard, Dawley & Wheeler, for appellant.
Chas. A. Clark & Son and *C. H. George*, for appellee.

ROBINSON, J. The facts involved in the death of Morbey are substantially as follows: On the 28th day of December, 1894, he was in the employment of the defendant as clinker puller or pitman, at Clinton, in this state. The defendant has at that place a roundhouse of sufficient capacity to hold a considerable number of locomotive engines. The roundhouse is connected with the main line and other tracks by means of what is known as the house or pit track. In that track, opposite the central part of the roundhouse, is a turntable, which is used in transferring engines to and from the roundhouse. East of that, and under the track, are two pits, which are used for removing ashes and clinkers from engines. Each pit is about 14 feet in length, and 4 feet in width, and 2 feet in depth from the level of the tops of the rails. Of these pits the one furthest west is south of the southeast corner of the roundhouse, and the other is a short distance further east. Thirteen feet east of the roundhouse is a water tank, and about 70 feet east of the roundhouse is a sandhouse. When an engine is to be cleared and placed in the roundhouse, it is run onto the pit track, east of the sandhouse. It is there taken by an employee known as an "hostler," or by the hostler's helper, and in due time is placed over one of the pits. An employee known as a "knocker" climbs into the cab, and another employee, called a "clinker puller" or "pitman," goes into the pit under the engine, and removes from the ash pan the ashes which shake into it while the engine is moving. He then gives a signal. The knocker turns on the blower, drops the drop grate, and with an iron bar knocks the fire, cinders, and

Case Stated.

clinkers out of the fire box. They drop into the ash pan, are there drenched with water, and are then drawn into the pit by the clinker puller. In cleaning the ash pan, he stands in front of it, and uses an iron hoe with a handle from seven to nine feet in length. If the engine be small, he is unable to stand erect, but is obliged to stoop somewhat if he works while standing. After the engine is cleaned, it is moved onto the turntable, and thence into the roundhouse. On the night of the accident, engine numbered 383 was moved onto the pit we have described, which is furthest west. A knocker was in the cab, and the decedent was in the pit, for the purpose of cleaning the ash pan. At that time engine 355 was standing on the pit track, a short distance east of the sandhouse, headed westward, but no one was on it. A clinker puller, named McGovern, after performing some service on engine 383, left it, and went to engine 355, took possession of it, and commenced to practice with it. He first ran it westward towards engine 383, then eastward, and then westward again; and when the engine was opposite the sandhouse, a hostler's helper, named Rahm, with a lantern in his hand, stepped from the ground into the cab. There is a conflict in the evidence as to what then occurred, but a few moments later the engine struck No. 383, and moved it forward from 10 to 16 feet. Morbey was caught under one of the drive wheels, and it passed over him, causing his death within a few minutes. It is alleged that the accident was caused by negligence on the part of the defendant, in that its employees, charged with the duty of caring for and operating engine 355, failed to use good care in the control and management of it; that McGovern was without sufficient knowledge or skill to be intrusted with an engine; and that Rahm failed to use due care after he went into the cab of engine 355 to stop it in time to avoid the collision. The defendant denies all negligence on its part, but admits that McGovern was not competent to manage an engine. It says, however, that he was not authorized, but, on the contrary, was forbidden, to move engines; that it was not a part of his duties, nor within the scope of his employment, to move them; and that, in doing so, he acted as a mere volunteer, and violated the rules of the defendant. It is claimed, further, that Morbey had assumed the risks of his employment; that he contributed to the accident by negligence on his part; and that the accident was not in any manner connected with the use and operation

of a railway, within the meaning of the statutes of this state.

1. When the evidence had been fully submitted, the defendant asked the court to direct a verdict in its favor, for the alleged reason that there was not sufficient evidence to authorize a verdict for the plaintiff. There was much evidence which tended to show that clinker pullers were not authorized to move engines; that McGovern had been forbidden to do so; and that none of the agents of the defendant charged with the duty of enforcing the rules had any knowledge that he had at any time moved engines, or that the rules forbidding clinker pullers to move them were disobeyed. There was also evidence which tended to show that Rahm did not know who the person who had charge of engine 355 was, in time to prevent the collision, but supposed that he was a competent person. There was evidence, however, which tended to show that clinker pullers, who were not specially authorized to do so, very frequently, if not habitually, moved engines, and that the employees of the defendant who had authority over the clinker pullers and engines, and who were authorized to enforce the rules of the defendant, had knowledge of the practice, and did not forbid it. The night of the accident was dark, and the light in the cab of engine 355 was dim. McGovern and Rahm do not agree respecting what occurred in the cab immediately preceding the accident; but both men knew that some one was in the pit under engine 383, and Rahm knew that McGovern was not competent to operate an engine. Some of the evidence tended to show that Rahm, after he entered the cab, recognized McGovern in time to have taken the engine and prevented the accident. The evidence did not necessarily show that Morbey contributed to the accident on his part. It was shown that on a former occasion he had been seen to sit on the rail in front of a drive wheel while pulling clinkers; that it was dangerous to do so; and that he had been ordered by the employee in charge of the work to discontinue the practice. It also appears that the drive wheel passed over his body from his left side, but no one saw him on the rail before the accident. The evidence does not show whether he was sitting on the rail, or was leaving the pit, or doing some other permissible act when the accident occurred. The jury was not authorized, in the absence of evidence to that effect, to presume that he was violating his instructions. We are of the opinion, therefore, that

Death of Employee—Negligence of Fellow Servant—Direction of Verdict.

the district court, properly refused to direct a verdict for the defendant.

2. The district court charged the jury as follows: "(5) To entitle the plaintiff to a verdict, she must prove to your satisfaction by a preponderance of the evidence,—that is, by the greater or superior evidence: First, that the said Clem L. Morbey was killed by reason of one engine of the defendant running into another engine; second, that, at the time of the accident,the defendant was negligent,and that Morbey's death was caused by said negligence; third, that said Morbey was not guilty of any negligence that directly contributed to his death. If you find all of said facts established in plaintiff's favor, your verdict should be for her; but, if she fails to establish any one of said facts, your verdict should be for the defendant. (6) All the acts of negligence charged against the defendant are withdrawn from your consideration, except the two following propositions: What right, if any, had McGovern to move or handle engines? Could Rahm, after he knew that McGovern was running the engine, have prevented the accident by the exercise of reasonable care and diligence on his part? * * * (9) * * * If you find from the evidence that the defendant's foreman, or whoever was in charge of the work McGovern was engaged in the performance of, knew he was in the habit of or did run engines, and that said foreman, or those who had charge of said work, did not prevent or forbid his doing so after they knew he was so doing,—if you find they did know it, then, and on your so finding, and on your finding that the plaintiff's intestate was not guilty of any negligence that contributed to his death, you would be warranted in finding for the plaintiff. (10) While it is admitted that McGovern was in the employment of the defendant as a clinker man, and that he committed the act which caused the death of Morbey, yet if you find from the evidence that at the time in question he had no authority to handle or move engines, and that the defendant's foreman, or whoever was in charge of the work McGovern was engaged in, did not know he was handling or moving engines, on your so finding, he would not be acting within the scope of his authority or employment, or in furtherance of the defendant's business, but was carrying into effect some purpose of his own, not connected with his employment, and the defendant would not be liable for such acts."

The defendant complains of the tenth paragraph, on the ground that it authorized a recovery by the plaintiff unless

the jury should find affirmatively that McGovern had no authority to handle engines; thus placing the burden of showing such want of authority upon the defendant. The plaintiff contends that the portions of the charge we have set out, when considered together, instructed the jury clearly that the burden specified was upon the plaintiff. If, however, such an interpretation was authorized, we do not think it is at all clear that it was the one which the jury adopted. It is true that the charge instructed the jury that the burden was on the plaintiff to prove negligence on the part of the defendant, and the sixth paragraph narrowed the inquiry to two questions, the first of which, and the one involved in the objection under consideration, was, "What right, if any, had McGovern to move or handle engines?" From the ninth paragraph of the charge the jury would naturally have concluded that the burden of proving that the defendant's foreman, or other agent in charge of the work in which McGovern was engaged, knew that he ran engines, was upon the plaintiff; yet the jury might well have concluded that the tenth paragraph required the defendant to show that McGovern did not have authority to handle engines, and that it did not know that he was handling them. We do not think the jury should have been left in doubt as to the party on whom the burden of proof rested. It was shown that the duties of McGovern did not require him to operate engines, and in view of that fact the burden was on the plaintiff to show that the defendant had knowledge that he did operate them. The tenth paragraph of the charge is, in legal effect, similar to instructions condemned in the cases of Gwynn *v.* Duffield, 66 Iowa, 708, 24 N. W. 523, and Nelson *v.* Railroad Co., 38 Iowa, 564, and is erroneous. The evidence submitted justifies the conclusion that the error was likely to be prejudicial.

Same—Burden of Proof.

3. The court, in the eleventh paragraph of the charge, instructed the jury that negligence of the decedent which contributed to his injury would not defeat a recovery by the plaintiff if it were found "that Rahm, when he came upon the engine, knew that it was in the hands of McGovern, and knew that, unless it was stopped, it would collide with the engine then standing on the pit, and that he knew that some one was working under the engine on the pit," and could, by the use of reasonable care or diligence, have prevented the collision, or have given warning which would have enabled the decedent to es-

Instructions—Assumptions of Fact.

cape the danger. It is said this portion of the charge is erroneous, because the evidence showed that it was the duty of Morbey to block the wheels of the engine he was under with blocks provided for that purpose, and that he failed to do so; that he would not have been injured had he blocked the wheels, or had he not been sitting on the rail; and that Rahm is not shown to have known that the wheels were not blocked, nor that Morbey was sitting on the rail; hence that Rahm did not know of Morbey's peril. We are of the opinion that the charge was erroneous in assuming that the decedent would necessarily have been injured by an unexpected movement of the engine he was under, and in assuming that Rahm knew that such was the case. There was evidence which tended to show that engine 355 was moving slowly when Rahm went upon it; that, if the wheels had been blocked, Morbey would not have been injured; and that, if he had remained in the pit, he need not have been injured, for the reason that the lowest part of the engine inside the rail was three feet or more higher than the bottom of the pit, and would not have touched him had he crouched on the pit bottom, as was sometimes done by clinker pullers when engines were moved onto and off of the pits. We do not think that paragraph 11 of the charge fairly presented the law and the duty of Rahm under facts which the jury may have found to exist at the time of the accident.

4. The court refused to give an instruction asked by the defendant, in words as follows: "The fact that McGovern was employed by the defendant to remove ashes and fire from its engines does not tend to prove that he was employed to move engines, or that he had any implied or apparent authority to move them." We think that this or something of a similar character should have been given.

Same—Scope of Employment.

5. The fourth instruction asked by the defendant, and refused, is as follows: "(4) The fact, if it be a fact, that McGovern or other clinker pullers had at times moved engines would not tend to prove that McGovern had authority to do so, unless the plaintiff further shows by a fair preponderance of the evidence that it was the general custom for clinker pullers to move engines, and that such general custom was known to the foreman, and not forbidden by him." Although this instruction, with some modification, may well have been given, yet the court did not err in refusing to give it in the form asked. The

Same.

fact that clinker pullers did at times move engines, if known to the foreman in charge of the work, and not forbidden, might tend to prove that they acted by authority, even though the practice did not amount to a general custom. This objection is also applicable to the sixth instruction asked by the defendant.

6. The conclusions we reach dispose of the controlling questions in the case. Others discussed depend upon the evidence, and may not arise on another trial. For the errors pointed out, the judgment of the district court is reversed.

MEYER

v.

ILLINOIS CENT. R. CO.

(*Supreme Court of Illinois, Feb. 17, 1899.*)

Injury to Fireman—Negligence of Conductor—Fellow Servants.*—Where the fireman of a train is injured through the negligence of the conductor in running the train, and the latter had not full control of the train, as defendant's principal officers would have had, or the train dispatcher had, and was required to run it according to the company's rules, and the accident does not occur on account of the conductor's exercise of any authority over the fireman, the negligence is that of a fellow servant.

APPEAL by plaintiffs from appellate court. Second district. *Affirmed.*

C. B. Morrison and *Dixon & Bethea*, for appellant.

Wm. Barge and *E. E. Wingert*, for appellee.

PHILLIPS, J. This was an action on the case by appellant against appellee to recover for damages arising from an injury received by reason of a train on which he was firing coming in collision with a train running in an opposite direction on appellee's road, causing appellant, to save himself, to jump from his engine and injure himself. His left foot

*See Norfolk & W. R. Co. *v.* Houchen's Adm'r (Va.), 8 Am. & Eng. R. Cas., N. S., 616 and *note*, p. 630.

and leg were run over by the cars and crushed, so that amputation became necessary. The accident occurred at or near the station of Lead Switch, in Jo Daviess county, Ill. The first count in the declaration, and the only one on which appellant claimed the right of recovery, sought to recover on the theory and charge that the conductor of the train, George McDuff, was the superior servant in charge of the appellant as fireman, and had charge of the running of the train, and entire control and management of it; that he was representing appellee as vice principal in the running of the train; and that the accident was due to his negligence in not causing the train which he was running, and of which appellant was fireman, to stop, and not to run past Lead Switch station, where he was ordered by the train dispatcher to meet wild east-bound train No. 508. The train McDuff was running was No. 18, and was west bound. It is insisted by the appellant that the failure of the conductor, McDuff, to cause the brakes to be set in time to stop his train at Lead Switch, and prevent collision with the train he was ordered to meet there, was such negligence as rendered appellee liable for the injury done to appellant by reason of the collision. The declaration further avers that the conductor had control of the fireman, as well as of all other employees of his train, and had a right to report a disobedience of his orders to the company and have them discharged, if the company would discharge them for disobedience. The act of negligence alleged against McDuff was that of omission, and not of commission. The case was tried by a jury, and resulted in a verdict for appellant for $9,000. A *remittitur* of $3,000 was entered, and a judgement on the verdict for $6,000 in favor of the appellant resulted. The defendant appealed to the appellate court for the Second district, where the judgment was reversed; and, as appears by the record, the court found "that the conductor, McDuff, mentioned in the declaration and evidence, was the fellow servant of the appellee, both having the same common master, to wit, appellant (the Illinois Central Railroad Company), unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not."

There is no evidence tending to show that McDuff, as conductor, had any power, more than any ordinary conductor. He had no special supervision over other employees, more than ordinary conductors. He was running the train from

point to point and station to station under scheduled time, and under orders, telegraphic or otherwise, of a train dispatcher, which he had no right to disobey, or command other employees to disobey. His power was limited. He had no right to employ either the engineer or fireman, or discharge either for any cause. He could report any dereliction of duty to headquarters, or to the superior officers of the road. So could any other employee report any other. Rule 41 of appellee reads as follows: No train will leave a station without a signal from its conductor, nor before its time as specfied in the time-table, without a direct and explicit order from the train master. Trains must be run under the directions of its conductor, except when his directions conflict with these rules or involve risk and hazard, in which case the engineer will be held equally responsible." It seems from this rule that he had partial control over the train and the train crew, but could not act contrary to the company's rules, or where his action involved risk or hazard, in which case the engineer was equally responsible. He had not the management of the train,-the full control,-as the principal officers of the company would have had, or that the train dispatcher had; and the engineer had a veto in case of risk, and must judge of when there was risk, as a matter of course. It may be admitted that it was the duty of the conductor to run the train inside the rules, and to so run it as to avoid injury to it and to every one connected with it and to the public; and the evidence tending to show that, while he was aware that he was to meet the other train at Lead Switch, he failed to keep his train under control, so as to stop at that station or avoid injury; but, under the circumstances, can he be regarded as the vice principal of appellee, so as to make it responsible for his negligent act, irrespective as to whether he was the fellow servant of appellant? If the conductor was not the vice principal of appellee in regard to the negligence charged, and which the evidence tends to prove, he was clearly the fellow servant of appellant. There is no dispute in this case, or claim by appellant, that the accident of the collision occurred in any other way than by the failure of the conductor to set the brakes himself, or to order the brakeman to do so, in time to stop the train at Lead Switch. The accident did not occur on account of the conductor's exercise of any authority over the appellant which appellant, by virtue of his inferior position, was bound to obey under penalty of discharge; but the accident resulting from the negligence, if any, was one that

might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman. The negligence was, then, that of a fellow servant, done in the performance of a fellow servant's duty, so far as the evidence shows. The fact that one of the number of servants is invested with power to control and direct the actions of others will not, of itself, render the master liable for the negligence of the governing servant. Railroad Co. *v.* May, 108 Ill. 288; Railway Co. *v.* Hawk, 121 Ill. 259, 12 N. E. 253; Gall *v.* Beckstein, 173 Ill. 187, 50 N. E. 711. In Railroad Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914, it was held that an engineer who, under the orders of the company, was regarded as conductor, was not a vice principal. These cases tend to show that the control of the train and crew must be complete, to constitute a foreman a vice principal. We fail to see how the conductor may be held to be a vice principal, as a matter of law, when, as a matter of fact, he is a fellow servant.

The finding of facts by the appellate court, that the plaintiff and the conductor were fellow servants, is conclusive on this court on that question, unless it is qualified by the further finding, "unless, under the evidence, and as a matter of law, said conductor stood in the relation of vice principal of appellant to appellee, which we find, as a matter of law, he did not." With the facts found that the relation of fellow servants existed, it cannot, as a principle of law, be held the relation did not exist. There is no evidence in this record showing that a vice principal relation of fellow servants existed. Where the evidence for the plaintiff is absolutely conclusive of the relation existing between master and servant, and reasonable minds would not differ as to whether the relation of fellow servants existed, in such case the question becomes one of law. Railway Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273. If this rule did not prevail, that a court could determine that the relation of fellow servants existed as a matter of law, and if a trial court, or court whose finding of facts must be held conclusive, could not adjudicate and determine that question of fact as a matter of law, then, where the facts are conceded or presented by the plaintiff alone, a court would be powerless to control the verdict, even though different minds would not differ as to the relation existing. Railway Co. *v.* Brown, *supra*. If it could not become a question of law under such circumstances, where it arises on

the evidence introduced by the plaintiff alone, or where the evidence is not in conflict, then in no case could a trial court instruct the jury to find for the defendant where the relation of fellow servants existed, however conclusive might be the evidence in that behalf. The holding of the appellate court on the question of law presented constitutes a holding of law on conceded facts. The finding of the appellate court, under the facts appearing in this record as the basis of its judgment, is conclusive on this point. Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767; Smith *v.* Billings, 169 Ill. 294, 48 N. E. 693; Anderson *v.* Association, 171 Ill. 40, 49 N. E. 205. The judgment of the appellate court is affirmed. Judgment affirmed.

MAGRUDER, J., dissenting.

MISSOURI, K. & T. RY. CO.

v.

MEDARIS.

(*Supreme Court of Kansas, Jan. 7, 1899.*)

Injury to Employee—"Fellow Servant Act."*—A stone mason employed by a railroad company in setting curbing around a depot and office building, and who was injured by the falling of a curbstone which was left standing in an insecure position by a co-employee, is not within the protection of the "Fellow Servant Act." (Laws 1874, c. 93, § 1), which makes railroad companies liable to their employees for damages resulting from the negligence of other employees.

(Syllabus by the Court.)

ERROR by defendant from Labette county district court. *Reversed.*

T. N. Sedgwick, for plaintiff in error.
W. D. Atkinson, for defendant in error.

JOHNSTON, J. C. F. Medaris recovered a judgment against the Missouri, Kansas & Texas Railway Company for personal injuries sustained by him while employed in setting a

*See notes at end of case.

curbing around the office building and depot of the railway company in Parsons. The curbstones had been prepared elsewhere, and shipped to Parsons, and unloaded near the building around which they were to be placed. The men employed to set the curbing dug a ditch, and several of the curbstones were brought up and left on the side of the ditch, ready to be placed. While setting a curbstone, another one, which had been left standing unsupported on the edge of the ditch, was upset, and fell upon the leg of Medaris, causing a permanent injury. He alleged that the injury resulted from the negligence of his co-employees, in leaving the stone in an insecure position; and the jury found that the allegation was sustained by the testimony, and awarded damages in the sum of $3,000.

The question we are called upon to determine is whether Medaris is within the protection of the statue which makes railway companies liable for damages to co-employees caused by the negligence of fellow servants (Laws 1874, c. 93, § 1). From the facts, it appears that there was no common-law liability for the injury sustained, but, if any exists, it arises under the "Fellow Servant Act" referred to. Whether Medaris is entitled to the benefit of this law depends upon the character of the work in which he was engaged, and not on the mere fact that he was an employee of a railroad company. The validity of the law has been sustained as against the charge that it was class legislation, on the ground that the hazardous character of the business of operating a railroad justified the passage of a law for the protection of those engaged in that service. The rule of liability applied under the statute is different from that which ordinarily applies between master and servant; but this difference is founded on the hazardous character of the service, and is not intended as a discrimination between employers. The statute would certainly be open to objection if a different rule of liability was applied to a railroad company than is applied to other employers under like circumstances and conditions. The hazards incident to the use and operation of railroads is a natural and reasonable classification, which justifies the exceptional legislation; for if the statute was not given that interpretation, and limited in its operation to the protection of those engaged in the hazardous service, it could not be upheld.

In Union Trust Co. *v.* Thomason, 25 Kan. 1, the statute was held to apply only to those engaged in the hazardous business of operating railroads. In Railway Co. *v.* Haley,

25 Kan. 53, the act was again construed, and it was remarked that it "embraces only those persons more or less exposed to the hazards of the business of railroading." We have had a number of border cases in which the interpretation referred to has been pushed to the uttermost limit, but they have all been cases where the injury occurred in connection with the use and operation of the railroad. In Railway Co. *v.* Harris, 33 Kan. 416, 6 Pac. 571, it was held to apply to a sectionman employed in repairing a track, and where he was injured while assisting in removing a rail from a car on the track. In Railroad Co. *v.* Koehler, 37 Kan. 463, 15 Pac. 567, the injury was received by a person while loading rails on a car to be taken to other portions of the company's road. It was held that the services were of such a character as brought him within the protection of the act. Railroad Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814, is a similar case, where a sectionman was injured while unloading material from a car for the purpose of repairing the railroad. The hazardous character of the service entitled him to the benefit of the act. In Railroad Co. *v.* Pontius, 52 Kan. 264, 34 Pac. 739, the act was held to apply to a bridge carpenter, who was injured while loading timbers on a car for transportation over the company's road. Emphasis was placed on the statement that the accident did not happen while he was engaged in building a bridge, but that it occurred in connection with the operation of a railroad; that is, in loading a car which was on the track for transportation over the railroad. In Railroad Co. *v.* Vincent, 56 Kan. 344, 43 Pac. 251, an employee of a railroad was injured by the negligence of his co-employee while engaged in repairing the railroad, and the claimed liability against the company was sustained.

In each of these cases it will be observed that the injured person held to be entitled to the benefit of the act was engaged in services connected with the use and operation of a railroad. Here, however, the service which Medaris was performing did not expose him to the hazards peculiar to the business of using and operating a railroad. He was not at work on a railroad, and his injury was not caused by the operation of a railroad or the use of any railroad appliance. It is true there were railroad tracks near the place where he was at work, but no train was passing or near to the place where Medaris was at work at the time the injury was inflicted. It is true, also, that he was at work for a railroad company, and upon the land of a railroad company; but this

does not entitle him to the benefits of the act. He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad. As the jury specially found, the work in which he was engaged involved no more risk or hazard than it would if the same work was being done for an individual at the same time and place. The benefits of the act can no more be claimed by him than they could by the carpenter who laid the floor in the office building, or nailed the shingles on its roof. No stronger claim could be made for him than could for a person injured while hauling the rock from the quarry to the place where the curbing was to be set. As was held by the supreme court of Minnesota, one rule of liability cannot be established for a railroad company as such, and another for other employers, under like circumstances and conditions. To avoid the imputation of class legislation, the distinction must be based upon a difference in the nature of the employment; "but no just reason can be suggested why such difference should be founded, not on the character of the employment, nor on the dangers to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another when the employment and its hazards are precisely the same." Lavallee *v.* Railway Co., 40 Minn. 249, 41 N. W. 974. See, also, Johnson *v.* Railway Co., (Minn.) 45 N. W. 156; Deppe *v.* Railroad Co., 36 Iowa, 52; Stroble *v.* Railway Co., 70 Iowa, 555, 31 N. W. 63. It is difficult to see how the validity of the law can be sustained, unless it is interpreted, as was stated in Railway Co. *v.* Haley, *supra*, to "embrace only those persons more or less exposed to the hazards of the business of railroading." We feel compelled to hold that the plaintiff below was not engaged in that kind of service when the injury was inflicted, and, therefore, that no liability against the company, under the statute, arises in his favor. Judgment reversed.

ALLEN, J., concurs.

DOSTER, C. J. I concur in the decision of this case, but only upon the assumption that the "Fellow Servant Act" of 1874 is not an amendment of the general railroad incorporation law. If it were such, I should have no doubt of the power of the legislature to impose upon railroad corporations

the obligation to respond in damages for injuries negligently inflicted by one of their employees upon another, whether engaged in the nonhazardous branches of the railroad service or otherwise. This would result from section 1 of article 12 of the state constitution, which ordains that "corporations may be created under general laws; but all such laws may be amended or repealed." The act in question has been, however, regarded as applying, not only to railroad corporations proper, but to other kinds of corporations, and to individuals engaged in the business of operating railroads. Trust Co. *v.* Thomason, 25 Kan. 1; Rouse *v.* Harry, 55 Kan. 589, 40 Pac. 1007. If it can be thus extended to cover such classes of cases, it cannot be regarded as a mere amendment of the railroad incorporation act, but must be considered as a remedial statute, applying rather to the business of railroad operation than as attaching qualifications and conditions to the exercise of railroad franchises. The questions herein suggested were not discussed before us, and as to what should be the proper view to be taken of them I have no matured judgment. However, I yield formal assent to the decision made, but without feeling myself bound by it as in other and ordinary cases.

NOTES.

"FELLOW SERVANT ACT" OF KANSAS.

Constitutionality.—The statute of Kansas of 1874, ch. 93, § 1, p. 143, Comp. Laws Kansas 1881, p. 784, which provides that "every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage," does not deprive a railroad company of its property without due process of law, and does not deny to it the equal protection of the laws, and is not in conflict with the fourteenth amendment to the constitution of the United States in either of these respects. Missouri Pac. R. Co. *v.* Mackey, 33 Am. & Eng. R. Cas. 390, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; *affirming* 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291; Missouri Pac. R. Co. *v.* Mackey, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.

Neither is said statute unconstitutional as class legislation. Atchison, T. & S. F. R. Co. *v.* Koehler, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.

Nor does it make an unconstitutional discrimination against railroad companies. Missouri Pac. R. Co. *v.* Mackey, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.

Notes

Scope.—This act was adopted by the legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that state follows it in Kansas; therefore, within the Iowa decisions it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts toward the employee is that degree of diligence which men in general exercise in respect to their own concerns, and contributory negligence of the injured employee bars a recovery under the statute, as in other cases. Missouri Pac. R. Co. *v.* Haley, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.

Contracts in Contravention of.—A railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in Kansas by chapter 93, Laws 1874; and a contract in contravention of this statute is void and no defense to an action brought by an employee for damages done to him in consequence of the negligence or mismanagement of a co-employee. Kansas Pac. R. Co. *v.* Peavey, 11 Am. & Eng. R. Cas. 260, 29 Kan. 169, 44 Am. Rep. 630.

Interpretation.—Negligence is not to be presumed, but must be proven; and where the evidence in an action against a railroad company, under the statute of February 26, 1874, shows that all the co-employees exercised toward the injured employee that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company. Missouri Pac. R. Co. *v.* Haley, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.

Notwithstanding the statute now provides that every railroad company shall be liable for all damages done to any employee in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, the knowledge or notice, act or omission, for which the company is responsible must be that of some agent or employee having authority or duty in the premises. Solomon R. Co. *v.* Jones, 15 Am. & Eng. R. Cas. 201, 30 Kan. 601, 2 Pac. Rep. 657.

The act of 1874, ch. 93 (Comp. Laws of 1879, ch. 84, ¶4914), making railroad companies liable for injuries to one employee through the negligence of a co-employee, does not change the rule of contributory negligence. Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472, 8 Pac. Rep. 780.

To What Servants Applicable.—A person employed upon a construction train to carry water for the men working with the train and to gather up tools and put them in the caboose or tool car is within the statute making railroad companies liable to their employ-

Notes

ees for injuries resulting from the negligence of co-employees. Missouri Pac. R. Co. *v.* Haley, 5 Am. & Eng. R. Cas. 594, 25 Kan. 35.

K. was in the service of a railroad company, engaged on the track and in the yard of the company. He assisted in loading a car of iron rails which were to be taken to other portions of the company's road. The rails to be loaded were in a pile ten feet high and ten feet from the track. The manner of loading was to place rails as skids, one end on the top of the rail pile, and the other on the middle of the track below. Two employees of the company who were on top of the pile placed the rails on the skids and allowed them to slide down, until ten of them were so lowered. They would then wait until eight men who were on the ground would lift the rails and shove them into a car which was standing on the track near by, and also until these men had stepped aside out of danger, when those on top would lower a like number of rails, which would in turn be placed in the car by the eight men on the ground. K. was one of the men engaged in placing the rails in the car, and after lifting the last rail of a certain lot, but before he had stepped aside, and without waiting the usual time to do so, the employees on top lowered another rail, which struck him with great force, crushing his leg, and from the effects of which he died. There was nothing to prevent those on top from seeing that K. had not reached a place of safety. *Held*, that he had a right to expect that the rail would not be thrown down until he was safely out of the way, or at least until he had sufficient time to get away after warning had been given; and that the employees on top of the rail pile were guilty of culpable negligence in lowering the rail as they did. Atchison, T. & S. F. R. Co. *v.* Koehler, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.

The character of the employment and service of K. at the time of the injury places him within the provisions of the act which makes railroad companies liable to their employees for damages resulting from the negligent acts of other employees (Laws 1874, ch. 93), which act is held to be valid. Atchison, T. & S. F. R. Co. *v.* Koehler, 31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567.

Under the act of February 26, 1874, making all railroads of Kansas liable "for all damages done to an employee of a company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees," one section hand who is injured while riding on a hand-car, through the negligence of those in charge of another hand-car carelessly running into him, may recover from the company. Union Trust Co. *v.* Thomason, 5 Am. & Eng. R. Cas. 589, 25 Kan. 1.

And so may a section man, employed to repair the roadbed and to take up old rails out of its track and put in new ones, who is injured,

without his fault, by the negligence of his co-employees in permitting an iron rail, intended to be placed on the track, to fall upon him while he is assisting in removing the rail from a push-car on the track. Union Pac. R. Co. *v.* Harris, 21 Am. & Eng. R. Cas. 584, 33 Kan. 416, 6 Pac. Rep. 571.

And a section man injured while unloading ties from a car, for the purpose of repairing the company's track. Atchison, T. & S. F. R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. Rep. 814.

Under the act of 1874, ch. 93, a fireman in charge of a switch engine, who is injured by the engineer of another switch engine negligently running his engine so as to collide with the engine on which the fireman is employed, may recover from the company. Missouri Pac. R. Co. *v.* Mackey, 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291.

It was the duty of the plaintiff, a brakeman, when his train was backing out of the station, to take a position on the platform of the car nearest the main line, and, when he neared the switch, to step off and adjust the switch and connect the main line. While performing this duty he received injuries in the following manner: The ground on the west side of the switch on the morning of the injury was level and hard, and had been in that condition for a long time. He passed the station, going east, at 8:21 in the morning, and returned to the station after dark, at 6:37 in the evening. After his trip down the road, and a short time before his return, the railroad company caused several car-loads of cinders to be unloaded in and about the switch for ballast. They were thrown up in heaps and piles on either side of the track and not properly smoothed down, and were so thrown that the ground on either side of the track was raised to the height of several inches, and left soft and spongy. According to his usual practice the plaintiff, without any notice or knowledge of the changed and unsafe condition of the track or roadbed, stepped from the moving train for the purpose of turning the switch, when his feet struck the cinders in such a way as to cause him to lose his balance and be thrown under the train, thereby crushing and mangling his left foot to such an extent that amputation was necessary. *Held*, that in the absence of contributory negligence on his part, the plaintiff was entitled to recover against the railroad company. Kansas City, Ft. S. & G. R. Co. *v.* Kier, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770.

Receivership Does Not Affect.—The right of a railroad employee to recover under the Kansas statute for an injury received through the negligence of a co-employee is not affected by the fact that the railroad is, at the time, in the hands of a receiver and operated by him. Hornsby *v.* Eddy, 56 Fed. Rep. 461.

CHICAGO & E. I. R. CO.

v.

ROUSE.

(*Supreme Court of Illinois, Feb. 17, 1899.*)

Wrongful Death—Negligence of Fellow-Servant—Conflict of Laws.* —A right of action accruing under the statute of Indiana providing that there may be a recovery against the employer for the death of a railroad employee caused by the negligence of a fellow servant, while the employee so killed is acting under the orders of some superior having authority to direct at the time of such death, may be enforced in Illinois, although under the laws of the latter state the doctrine of *respondeat superior* does not apply to such cases.

APPEAL by defendant from Third district appellate court. *Affirmed.*

Will H. Lyford, *H. M. Steely*, and *Albert M. Cross*, for appellant.

Tilton & Cundiff, for appellee.

BOGGS, J. George W. Brewer, deceased, appellee's intestate, during his lifetime and at the time of his death, was a resident of Vermilion county, in this state. The appellant, a corporation organized under the laws of this state, was engaged in operating its trains over its own lines and leased lines of railway in the states of Illinois and Indiana. Said intestate was employed as a fireman on one of appellant's locomotive engines, and, while engaged in the discharge of his duty in that capacity on an engine drawing a passenger train along the line of appellant's road in the state of Indiana, was killed by a collision between the said engine and train upon which he was employed, and another engine, drawing a freight train, controlled and operated by other servants of the appellant company upon its said line of road in the state of Indiana. This was an action on the case, commenced in the circuit court of Vermilion county, Ill., by the appellee, administrator of the said Brewer, to recover damages for the benefit of

*See notes at end of case.

those entitled to receive distribution of the personal effects of the said deceased.

The declaration, in some of the counts, charged that the collision was occasioned by the negligence of the conductor of the freight train, and, in other counts, that the trains collided because of the negligence of the engineer of the freight train, and counted and predicated the right of recovery upon an alleged liability created by the statute of the state of Indiana in such cases, and set forth the statute of such state, and such statute was produced in evidence. Section 7083 of the Indiana statute (Burns' Rev. St. 1894, § 7083) provides that where the death of an employee of any railroad company or other corporation is caused by negligence of any person in the employ or service of such corporation who has charge of any locomotive engine or train of cars upon any railroad, or by the negligence of any fellow servant engaged in the same common service in any of the several departments of such corporation, while the employee so killed is obeying or conforming to the orders of some superior having authority to direct at the time of such death, the railway company or other corporation operating such locomotive engine or train shall be liable to respond to the personal representative of such deceased in damages in a sum not exceeding $10,000, to be distributed to the widow and children, if any, or next of kin, of the deceased, in the same manner as personal property of the deceased. A plea of not guilty was filed, and the cause submitted to and heard by a jury, who returned a verdict in favor of the appellee administrator in the sum of $5,000. The judgment was affirmed by the judgment of the appellate court for the Third district on appeal, and the appellant company has prosecuted a further appeal to this court.

The effect of the statute of Indiana is to abrogate the doctrine which, it seems to be conceded, would otherwise be applicable to the facts of this case,—that the appellant company, as employer, is not to be held liable for an injury, fatal or otherwise, to an employee which was occasioned by the negligence of a fellow servant of such employee. The principal question arising is whether this statute will be applied and the doctrine thereof enforced in an action instituted and maintained in the courts of this state, or whether the law as it exists in this state will govern and control. Actions not penal, but for pecuniary damages for torts or civil injuries to the person or property, are transitory, and, if actionable where committed, in general may be maintained

in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought. Dicey, Confl. Laws, pp. 667–669, par. 1; Herrick *v.* Railway Co., 31 Minn. 11, 16 N. W. 413; Dennick *v.* Railroad Co., 103 U. S. 11; The Scotland, 105 U. S. 29; Railroad Co. *v.* Babcock, 154 U. S. 190, 14 Sup. Ct. 978; Higgins *v.* Railroad Co., 155 Mass. 176, 29 N. E. 534; Walsh *v.* Railroad Co., 160 Mass. 571, 36 N. E. 584; Burns *v.* Railroad Co., 113 Ind. 169, 15 N. E. 230; Morris *v.* Railway Co., 65 Iowa, 727, 23 N. W. 143; Leonard *v.* Navigation Co., 84 N. Y. 48; Railway Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603; McLeod *v.* Railroad Co., 58 Vt. 726, 6 Atl. 648.

It is argued by counsel for appellant that an action cannot be maintained in this cause in our courts, for the reason, as alleged, that the laws of the two states are materially variant, it being, as counsel insist, against natural justice and the established public policy of this state to hold an employer liable for injuries inflicted upon an employee by a fellow servant. This position finds support in the opinion rendered by the supreme court of Wisconsin in Anderson *v.* Railway Co., 37 Wis. 321, and also in expressions employed in opinions rendered in cases in the courts of England. But such is not the prevailing doctrine in the courts of this country. The supreme court of the state of Minnesota, having before it the precise point in the case of Herrick *v.* Railway Co., 31 Minn. 11, 16 N. W. 413, gave forcible and clear expression of that which we conceive to be the correct doctrine. In that case the injury was inflicted in the state of Iowa, and was actionable under a statute of that state making railroad corporations liable for damages sustained by an employee in consequence of the negligence of a fellow servant. The rule of nonliability for injuries caused by a fellow servant obtained in Minnesota, where the action was brought. The court said: "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced if not against the public policy of the laws of the former. In such cases

the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*. The defendant admits the general rule to be as thus stated, but contends that, as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers, notably Rorer on Interstate Law, seem to lay down this rule, but the authorities cited generally fail to sustain it. * * * But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the law of the state where made. To justify a court in refusing to enforce a right of action which accrued under the laws of another state because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." The same question engaged the attention of the supreme court of the state of Massachusetts, in Walsh *v.* Railroad Co., 160 Mass. 571, 36 N. E. 584, and it was said: "If, however, we assume, as was ruled and as we do assume, that, if the accident had happened in this state, the plaintiff could not have recovered, it is argued he cannot recover now. As between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by

the law which governed the conduct of the parties." In Railroad Co. *v.* Babcock, 154 U. S. 190, 14 Sup. Ct. 978, the observations of the supreme court of the state of Minnesota in Herrick *v.* Railway Co., *supra*, were quoted with approval, and the principles of that case applied. And in Railroad Co. *v.* McDuffy, 25 C. C. A. 247, 79 Fed. 934, it was ruled the responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose. In Railway Co. *v.* Lewis, *supra*, the suit was brought in Tennessee to recover damages for injuries received by an employee in the state of Georgia. The trial court charged the jury the plaintiff could recover, though guilty of contributory negligence. Such was the law of Tennessee, the place of the forum. The rule in the state of Georgia, the place where the jury was received, precluded recovery if the neglect of the person injured contributed to his injury. The court held the law of the state of Georgia controlled, and that the rule in the state of Tennessee, where the case was being tried, was not applicable to the case. The supreme court of the state of Indiana has declared the statute in question to be constitutional and valid. Railway Co. *v.* Montgomery, 49 N. E. 582. The right of action accrued and became complete in that state. In this state the doctrine of *respondeat superior* does not apply to a case where an employee is injured or killed by the neglect of a fellow servant, but the doctrine of *respondeat superior* is, in general, recognized in the jurisprudence of this state, and we perceive no ground warranting us to declare the enforcement of the doctrine as enlarged or extended by the Indiana statute must be regarded as so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people, that we should shut the doors of our courts against a suitor who seeks to enforce a right of action which arose under the statute of the sister state.

What has been said disposes of all objections to the action of the court in giving, refusing, and modifying instructions to the jury, except the complaint as to one instruction given for the appellee, relative to the liability of the company in the event they should find the trains collided because of the negligence of the conductor of the freight train. The criticism made upon this instruction is that there was no evidence to support it. We think the objection is not well grounded. The testimony of the engineer of the freight train, which was proceeding northward, tended to show he was induced to

refrain from putting the train upon the side track at the stations of Atherton and Lyford by a remark, in the nature of directions, made to him by the conductor at Otter Creek Junction. It further appeared that the conductor was riding in the cab of the engine of the freight train when that train ran past the side tracks at Atherton and Lyford. The trains collided 500 feet north of Lyford. The freight train should have been placed on the side track at Atherton or at Lyford, and this the conductor knew, or would have known had he kept his orders in mind, and noted the fact that his train was moving on the time of the passenger train, which was coming south. No other errors are assigned, and the judgment of the appellate court is affirmed. Judgment affirmed.

NOTES.

Death by Wrongful Act—Extraterritorial Effect of Statutes.—Where a death occurs in another state, the rights and liabilities of the parties are governed by the laws of that state, and not by the laws of the state where suit is brought. Armstrong *v.* Beadle, 5 Sawy. (U. S.), 484; Shedd *v.* Moran, 10 Ill. App. 618; Buckles *v.* Ellers, 72 Ind. 220; Hyde *v.* Wabash, St. L. & P. R. Co. (Iowa), 15 Am. & Eng. R. Cas. 503; McCarthy *v.* Chicago, R. I. & P. R. Co., 18 Kan. 46; State *v.* Pittsburgh & C. R. Co., 45 Md. 41; McMasters *v.* Illinois Cent. R. Co. (Miss.), 65 Miss. 264, 41. Am. & Eng. R. Cas. 486; Chicago, St. L. & N. O. R. Co. *v.* Doyle (Miss.), 8 Am. & Eng. R. Cas. 178; Vawter *v.* Missouri Pac. R. Co. (Mo.), 19 Am. & Eng. R. Cas. 176; Whitford *v.* Panama R. Co., 23 N. Y. 465, aff'g 3 Bosw. (N. Y.), 67; Vanderwerken *v.* New York & N. H. R. Co., 6 Abb. Pr. (N. Y.), 239; Beach *v.* Bay State Steamboat Co., 30 Barb. (N. Y.), 433, rev'g 27 Barb. (N. Y.), 248; Crowley *v.* Panama R. Co., 30 Barb. (N. Y.), 99; Vandeventer *v.* New York & N. H. R. Co., 27 Barb. (N. Y.), 244; Stallknecht *v.* Pennsylvania R. Co., 53 How. Pr. (N. Y.), 305; Hover *v.* Pennsylvania R. Co., 25 Ohio St. 667; Nashville & C. R. Co. *v.* Eakin, 6 Coldw. (Tenn.), 582; Phillips *v.* Eyre, L. R., 4 Q. B. 225, aff'd L. R., 6 Q. B. 1. And it has been held in England that where the injury for which suit was brought was sustained in a colony, an act of the colonial legislature, rendering legal the wrongful act done subsequently passed before an action had been brought in England, took away the right of action not only in the courts of the colony, but, also in those of England. Phillips *v.* Eyre, L. R., 4 Q. B. 225, affd L. R., 6 Q. B. 1. Therefore, where the cause of action

does not survive by the laws of the state where it accrued, no recovery can be had in another state upon a statute thereof. Willis *v.* Missouri Pac. R. Co. (Tex.), 23 Am. & Eng. R. Cas. 379; Needham *v.* Grand Trunk R. Co., 38 Vt. 294. And the fact that the defendant is a corporation created by the state where the action was brought for the purpose of constructing and operating a railroad in the foreign state or country where the plaintiff's intestate was killed, does not have the effect of creating a cause of action under the statute of the state where the suit is brought. Whitford *v.* Panama R. Co., 23 N. Y. 465.

Where the death was caused on the high seas on board a vessel hailing from, and registered in, a port within the state where the action is brought, and owned by citizens thereof, the person whose death was so caused being also a citizen of the state, the vessel being at the time employed by the owners in their own business and their negligence being alleged to have caused the death, the cause of action is deemed to have arisen within the state, and therefore to be governed by its laws. McDonald *v.* Mallory, 77 N. Y. 546. This case must be considered to overrule Mahler *v.* Norwich & N. Y. Transp. Co., 35 N. Y. 352, in which it was held that an action cannot be maintained by an administrator under the statutes, where the death of the intestate and the negligence causing it, occurred in the open seas beyond the territorial limits of the state, upon a vessel owned therein and during a voyage between two ports, both within the state.

Same—Suits in Sister State under Statute of State Where Accident Occurred.—Actions to recover damages for death caused by the wrongful act, neglect, or default of another, are transitory in their nature. Dennick *v.* Central R. Co. (U. S.), 1 Am. & Eng. R. Cas. 309; Shedd *v.* Moran, 10 Ill. App. 618; Cincinnati, H. & D. R. Co. *v.* McMullen (Ind.), 38 Am. & Eng. R. Cas. 165. But if enforced in a foreign state it can only be by comity, by a remedy according to the procedure of the state where suit is brought. Vawter *v.* Missouri Pac. R. Co. (Mo.), 19 Am. & Eng. R. Cas. 176; Knight *v.* West Jersey R. Co. (Pa.), 26 *Id.* 485.

But whenever the right of action has become fixed and a legal liability incurred, that liability may be enforced and a right of action pursued in any court which has jurisdiction of the parties. Boyce *v.* Wabash R. Co. (Iowa), 23 Am. & Eng. R. Cas. 172; Dennick *v.* Central R. Co. (U. S.), 1 *Id.* 309. See also Central R. Co. *v.* Swint (Ga.), 26 Am. & Eng. R. Cas. 482; Nashville & C. R. Co. *v.* Sprayberry, 8 Baxt. (Tenn.), 341. But in Willis *v.* Missouri Pac. R. Co. (Tex.), 23 Am. & Eng. R. Cas. 379, WILLIE, C. J., said that where the right of action does not exist except by reason of statute,

it can be enforced only in the state where the statute is in existence and where the injury has occurred, that is to say, the cause of action must have arisen and the remedy must be pursued in the same state, and that must be the state where the law was enacted and has effect. In the subsequent case of St. Louis, I. M. & S. R. Co. *v.* McCormick, 71 Tex. 660, the court declared that it would neither formally adopt nor recede from the *dictum* of the chief justice in Willis's case. In Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177, it was said that the law creating a right of action against a railroad company for causing the death of a person by wrongful act or negligence, is purely local to the state in which the right is created, although it may be otherwise in causes of action under the statute in cases of individuals. Corporations being local to the state which creates them, the right of action against them must be local to the same state, and cannot be enforced beyond its territorial jurisdiction. It would appear, however, that the consideration of the point was not necessary to the decision of the case, and it is certainly against the great weight of authority.

Same—Penal Actions.—In some cases *dicta* are to be found to the effect that statutes conferring a right of action for death caused by wrongful act or neglect are penal, and therefore will not be enforced in other jurisdictions. Thus in Richardson *v.* New York Cent. R. Co., 98 Mass. 85, the court after referring to the rule of law that a penal statute cannot be enforced beyond the territory in and for which it was enacted, and after pointing out that the cause of action conferred by the New York statute was not for compensation for the injury to deceased's estate, but that the compensation belonged to his widow and children, said: "If we understand that the limitation of the defendants' responsibility to cases in which the deceased would have had a right of action if he had survived, is not intended to make his right of action survive to his representatives, but is only meant to define and describe the cases in which the right of property and of action is recognized in the widow or next of kin, we have still the question to meet. How can that be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be estimated in computing it; and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer to this question." The court, however, did not decide the case upon this ground.

Notes

This *dictum* was quoted with approval in McCarthy *v.* Chicago, R. I. & P. R. Co., 18 Kan. 46, 49. But in Shedd *v.* Moran, 10 Ill. App. 618, the court held that such statutes are not to be deemed penal in their nature, nor to be regarded as a part of the police regulations of the state which enacts them.

In Bettys *v.* Milwaukee & St. P. R. Co., 37 Wis. 323, it was held that double damages for stock killing are by way of penalty, and the liability therefor, cannot be enforced by suit in a state other than that in which the cattle were killed. But in Boyce *v.* Wabash R. Co. (Iowa), 23 Am. & Eng. R. Cas. 172, the court held that an action will lie in Iowa to recover double damages allowed by the statutes of Illinois for the killing of a mule therein, it appearing that the statutes accord with the statutes and policy of the state of Iowa, and that it made no difference even if it were conceded that the statute in question was enacted by virtue of the police power of the state of Illinois.

Same—Existence of Similar Statute in State Where Suit Brought Essential.—In the greater number of decisions, the right to recover for the wrongful death of a person in a foreign state by virtue of a statute thereof, is conditioned upon the existence of a similar statute in the state in which suit is brought. See Burns *v.* Grand Rapids & I. R. Co., 113 Ind. 169; Cincinnati, H. & D. R. Co. *v.* McMullen (Ind.), 38 Am. & Eng. R. Cas. 165; Morris *v.* Chicago, R. I. & P. R. Co. (Iowa), 19 *Id.* 180; Bruce's Adm'r *v.* Cincinnati R. Co., 83 Ky. 174; Davis *v.* New York & N. E. R. Co. (Mass.), 28 Am. & Eng. R. Cas. 223; Vawter *v.* Missouri Pac. R. Co. (Mo.), 19 *Id.* 176; Stoeckman *v.* Terre Haute & I. R. Co., 15 Mo. App. 503; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48; Stallknecht *v.* Pennsylvania R. Co., 53 How. Pr. (N. Y.), 305; Knight *v.* West Jersey R. Co. (Pa.), 26 Am. & Eng. R. Cas. 485; St. Louis, I. M. & S. R. Co. *v.* McCormick, 71 Tex. 660. But in some cases it has been held that it is sufficient that the cause of action is not contrary to the policy of the state where the suit is brought, and that the existence of a similar statute is only evidence that the action may be maintained without violating any rule of policy. Shedd *v.* Moran, 10 Ill. App. 618; Chicago, St. L. & N. O. R. Co. *v.* Doyle (Miss.), 8 Am. & Eng. R. Cas. 171. And it has even been held that the right of action created by the statute of one state may be enforced in another independently of any statutory provision in the latter state, provided it be not in conflict with the public policy of the state in which it is sought to enforce it. Chicago, St. L. & N. O. R. Co. *v.* Doyle (Miss.), 8 Am. & Eng. R. Cas. 171. And in Herrick *v.* Minneapolis & St. L. R. Co. (Minn.), 11 Am. & Eng. R. Cas. 256, it was held that it is not necessary that the law of the state where the right of action

accrued and the law of the state where it is sought to be enforced, should concur in giving a right of action. Accordingly, the court declared that a statute making railroad companies liable for damages sustained by employees in consequence of the negligence of co-employees, when such wrongs are connected with the use and operation of any railroad, on or about which they shall be employed, is not against the public policy of the laws of Minnesota, although different from the common rule which is retained in that state, and that an action might be maintained.

In the jurisdictions where it is deemed essential that similar statutes should exist, it has been held to be sufficient if the statutes are of similar import and character, and that it is not necessary that they should be precisely the same. Morris *v.* Chicago, R. I. & P. R. Co. (Iowa), 19 Am. & Eng. R. Cas. 180; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48. But the existence of a similar statute in another state will not be presumed; it must be proved. McCarthy *v.* Chicago, R. I. & P. R. Co., 18 Kan. 46, 49; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48. And where it is material to determine whether the statute of the state where the accident occurred, and the statute enforced in the state where suit is brought are substantially the same, the question is for the court. Patton *v.* Pittsburgh, C. & St. L. R. Co. (Pa.), 11 Am. & Eng. R. Cas. 658.

A statute of one state by which a right of action for personal injuries survives will not be enforced by the courts of a state in which the common law by which such cause of action dies with the person, is unchanged. Texas & P. R. Co. *v.* Richards, 68 Tex. 375. See also Anderson *v.* Milwaukee & St. P. R. Co., 37 Wis. 321; Bettys *v.* Milwaukee & St. P. R. Co., 37 Wis. 323.

Where the statute of the state in which the injuries causing the death were sustained, confers the right of action upon the husband, wife or children of the deceased, and the statute of the state where the action is brought confers the right of action upon the personal representative, such a dissimilarity exists as prevents an administrator appointed in the latter state from maintaining the action. McCarthy *v.* Chicago, R. I. & P. R. Co., 18 Kan. 46. But in this case, the court declared that it did not pass upon the question whether an administrator appointed under the laws of another state, having similar provisions of law to those imposed in Kansas, might or might not maintain an action in Kansas for the purpose of recovering a fund to be distributed under the laws of the state whence he derives his appointment. If, however, the right of action is conferred upon ths same person in both states, *viz.*: the personal representative, but the statute of the state where the accident occurred limits the amount recoverable, while no such limitation is

Notes

placed by the statute of the state where suit is brought, and the statute of the former state also provides that the recovery shall be for the exclusive benefit of the widōw and next of kin, while in the latter state the recovery shall be disposed as other personal estate, except that it shall not be liable for the payment of debts, if the deceased leaves a husband, wife, child or parent, the dissimilarity is not so great as to preclude an action being maintained in the latter state, the distribution being to the same persons in both states. Morris *v.* Chicago, R. I. & P. R. Co. (Iowa), 19 Am. & Eng. R. Cas. 180. But a contrary view has been adopted in Texas and it has been held that when by the statute of the state where the death occurred, damages recovered are distributed as personal assets of the deceased, and in the state where the suit is brought they are divided among the persons named in the statute in such proportion as the jury shall determine, the statutes are so dissimilar that the action will not be entertained under the rule of insterstate comity. St. Louis, I. M. & S. R. Co. *v.* McCormick, 71 Tex. 660.

The statute of Missouri expressly prohibits the prosecution by an administrator of a civil action to the person of the intestate. Therefore an administrator appointed in Missouri will not be permitted to sue in Missouri under a Kansas statute for the death of the intestate in Kansas, although the Kansas statute provides that the right of action shall accrue to the personal representative. Vawter *v.* Missouri Pac. R. Co. (Mo.), 19 Am. & Eng. R. Cas. 176. Conversely, an administrator appointed in Missouri cannot maintain an action in Kansas under the Kansas statute, authorizing personal representatives to bring an action for damages for wrongfully causing the death of the intestate, when the law of Missouri prohibits him from instituting such an action in his own state. Limekiller *v.* Hannibal & St. J. R. Co. (Kan.), 19 Am. & Eng. R. Cas. 184.

Under the Massachusetts statute, an action cannot be maintained in Massachusetts by an administrator against a railroad operating a continuous line in Massachusetts and Connecticut, for injuries received by the intestate through the negligence of the defendant while the intestate was travelling over its road in Connecticut, where the statutes of the latter state do not provide for the survival of such action, and especially when the statutes of that state provide for the indictment of the railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased. Davis *v.* New York & N. E. R. Co. (Mass.), 28 Am. & Eng. R. Cas. 223.

WRIGHT

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Nov. 28, 1898.*)

Negligence of Fellow Servants—Statutory Provision.—The act providing that in actions against railroad companies for death or injuries sustained by an employee the negligence of a fellow servant shall not be a defense does not apply where the death occurred prior to the enactment of such law.

Duty to Have Safe Roadbed Cannot be Delegated.*—The duty of the company to have a safe roadbed cannot be delegated to a subordinate, as the fellow servant of an employee whose injury or death is the result of a defective roadbed.

APPEAL by plaintiff from Rowan county superior court. *Reversed.*

A. C. Avery, *Lee S. Overman*, and *R. L. Wright*, for appellant.

George F. Bason and *Charles Price*, for appellee.

CLARK, J. The death of the plaintiff's intestate occurred prior to the act of 1897 (inadvertently printed among the Private Laws of that year,—chapter 56), which provides that in actions against railroad companies for death or injuries sustained by an employee the negligence of a fellow servant shall not be a defense. Therefore the doctrine in force prior to that statute applies. Rittenhouse *v.* Railway Co., 120 N. C. 544, 26 S. E. 922. The court charged the jury that, if they found that "the death was caused by the negligence of the section master in not providing the road with sound ties," to answer the second issue, "Yes". That issue was, "Was the injury and death of plaintiff's intestate caused by the negligence of a fellow servant?" This instruction was specifically excepted to, and is clearly erroneous. It is the duty of the master, the corporation, to furnish a safe roadbed. It is not within

Negligence of Fellow Servants —Statutory Provision.

*See note at end of case.

the scope of the duty or the powers of the section master to provide cross-ties. The plaintiff's intestate (a brakeman) and the section master were, as held in Wright *v.* Railroad Co., 122 N. C. 852, 29 S. E. 100, and in Rittenhouse's Case, *supra*, fellow servants, within the scope of their duties. In the latter case there was a defect in the roadway by a spike projecting two high, and this was the negligence of the track foreman of the street railway, and it was held that, being the fellow servant of the motorman, the latter could not recover for an injury caused by the negligence of such fellow servant. But the failure to provide a safe roadbed, or material for it, such as sound ties, or good rails, and the like, is the negligence of the corporation, and not of the section master. Indeed, when this case was here before (122 N. C. 959, 30 S. E. 348), the court said: "If the defendant, by having proper appliances (air brakes) and a good roadbed, could have avoided the injury to the intestate, it is liable." That it is the negligence of the master not to have a safe roadbed, and that this duty cannot be shifted off on a subordinate, as the fellow servant of an employee who is injured or killed, is almost universally recognized. Chesson *v.* Lumber Co., 118 N. C. 59, 23 S. E. 925; Railroad Co. *v.* Daniels, 152 U. S. 688, 14 Sup. Ct. 756; Hough *v.* Railway Co., 100 U. S. 213, 218; Patton *v.* Railway Co., 27 C. C. A. 287, 82 Fed. 979; Lewis *v.* Railroad Co., 59 Mo. 495; McKinney, Fel. Serv. § 29, citing many cases; and 1 Shear. & R. Neg. (5th Ed.) § 197, and numerous cases cited in note 12. Indeed, the proposition requires no citation of authority. Pleasants *v.* Railroad Co., 121 N. C. 492, 28 S. E. 267, instead of being an authority for the defendant, clearly concedes (page 496, 121 N. C., and page 268, 28 S. E.) that it was the duty of the railway company to keep its roadbed in safe condition, and that it could not delegate this duty to a servant so as to exempt the company from liability to an employee for injury caused by a defective roadway.

Duty to Have Safe Roadbed Cannot be Delegated.

It is true that on the first issue, "Was the injury and death of plaintiff's intestate caused by the negligence of the defendant?" the court charged the jury, "if they found it was caused by reason of a defective roadbed, or of the cross-ties being defective or rotten, they should answer the first issue 'Yes,'" but added, "This is subject to instructions on second issue," and on the second issue he instructed the jury erroneously, as above pointed out, that they might find

that "the failure to provide cross-ties was the fault of a fellow servant,"—a section master. These instructions are contradictory, and, if the jury took the latter view as law, they necessarily would find, as they did on the first issue, that the railroad company was not guilty of negligence. Error.

NOTE

Fellow Servants—Injuries Caused by Defective Track or Roadbed.—The great weight of authority in this country has settled the rule that negligence in keeping the roadway of a railroad in a safe and suitable condition is negligence, which as between an employee injured thereby and the company is chargeable upon the company. Chicago & N. W. R. Co. *v.* Sweet, 45 Ill. 201; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183; Hall *v.* Missouri Pac. R. Co. 74 Mo. 298, 8 Am. & Eng. R. Cas. 106; Lewis *v.* St. Louis, I., M. & S. R. Co., 49 Mo. 495, 21 Am. Rep. 385; Vautrain *v.* St. Louis, etc., R. Co., 8 Mo. App. 538; Snow *v.* Housatonic R. Co., 8 Allen (Mass.), 441; Moon *v.* Richmond & A. R. Co., 78 Va. 745, 17 Am. & Eng. R. Cas. 531; Torians *v.* Richmond & A. R. Co. (Va.), 4 S. E. Rep. 339; Baltimore, etc., R. Co. *v.* McKenzie (Va.), 24 Am. & Eng. R. Cas. 395; Hullehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 31 Am. & Eng. R. Cas. 322; Houston, etc., R. Co. *v.* Dunham, 49 Tex. 181; Davis *v.* Central Vt. R. Co., 55 Vt. 84, 45 Am. Rep. 490, 11 Am. & Eng. R. Cas. 173; Calvo *v.* Charlotte, etc., R. Co., 23 S. Car. 526, 28 Am. & Eng. R. Cas. 341; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 633, 31 Kan. 197; 11 Am. & Eng. R. Cas. 243, 15 Am. & Eng. R. Cas. 312; Kansas City, etc., R. Co., *v.* Kier (Kan., 1889), 21 Pac. Rep. 770; Drymala *v.* Thompson, 26 Minn. 40; Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499; O'Donnell *v.* Allegheny V. R. Co., 59 Pa. St. 239; Patterson *v.* Pittsburgh & C. R. Co., 76 Pa. St. 389; Louisville & N. R. Co. *v.* Bowles, 9 Heisk. (Tenn.) 866; 1 Alb. L. J. 119; Hardy *v.* Carolina Cent. R. Co., 76 N. Car. 5; Central R. Co. *v.* Mitchell, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145. If the duty of keeping a bridge in repair is entrusted by the company to its foreman, his negligence is that of the company. Bowen *v.* Chicago, B. & K. C. R. Co. (Mo.) 8 S. W. Rep. 230. *Compare* Gaffney *v.* New York, etc., R. Co. 15 R. I. 456, 31 Am. & Eng. R. Cas. 265; Fagundes *v.* Central Pac. R. Co. (Cal., 1889), 21 Pac. Rep. 437. In the last case a track repairer caused the death of a laborer riding on a train, by interfering with a switch with which he had no concern. A few states, however, have not accepted this doctrine. Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178; New

Note

Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258; Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245; Harrison *v.* Central R. Co., 31 N. J. L. 293. The English common law decisions are also opposed to it. Thus in Walter *v.* South Eastern R. Co., 2 H. & C. 102, it was held that the guard of a train and the plate layers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object, in safe conduct and transit of the train, and therefore no action can be maintained against the company by the representatives of a guard of a train killed by the train running off the line, in consequence of the negligence of the ganger of the plate layers to renew the decayed metals which fasten the chairs to the sleepers of the railway.

While the rule is generally applicable that when it is the duty of the employee of a railroad corporation, in the course of his work, to ride over the road of the corporation, it is its duty to provide a track suitable and sufficient for the purpose, and to maintain it in good order, it must be considered with some qualification when the road has become dilapidated and out of repairs, and is in the process of reconstruction, in which work the employee is engaged. Thus, in a New York case, B., plaintiff's intestate, was one of a number of laborers in defendant's employ, engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which B. was riding ran off the track at a crossing and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. T. was defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition. He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, it was held that the negligence causing the injury was that of a co-employee, and that defendant was not liable: also that the fact that the duty was imposed upon T. of reconstructing the entire road, did not alter his relations as co-employee here. Rochester, etc., R. Co. *v.* Brick, 98 N. Y. 211, 21 Am. & Eng. R. Cas. 605.

FLORIDA CENT. & P. R. Co.

v.

MOONEY.

(*Supreme Court of Florida, June 13, 1898.*)

Negligence—Evidence.—In actions for negligence, any evidence tending to prove knowledge on the part of the person alleged to have been negligent of those circumstances and surroundings which enter into the question as to whether such person has failed to exercise proper care is admissible.

Injury to Employee—Negligence of Co-Employee—Contributory Negligence—Apportionment of Damages.—To entitle an employee to recover damages from his employer for personal injuries caused by the negligence of another employee, under the provisions of chapter 4071, Acts 1891, the plaintiff must himself have been free from fault, as the provisions of section 2 of that act relating to the apportionment of damages have no application to such cases.

Same—Burden of Proof.*—In an action by an employee under the provisions of chapter 4071, Acts 1891, to recover damages from his employer for injuries alleged to have been inflicted by the negligence of another employee in performing some act in the defendant's service, in the performance of which plaintiff as a co-employee was participating, the plaintiff must show either that he was free from fault himself, or that there was negligence on the part of his co-employee. Upon proof that plaintiff was free from fault, the statutory presumption arises that the servants of the defendant were at fault; and it thereupon devolves upon the defendant to "make it appear" to the contrary.

Same—Same—Negligence of Another Employee.—If the act resulting in injury to plaintiff, an employee, was one being performed by other employees in the defendant's business, but in the performance of which plaintiff was not participating, then the presumption of negligence on the part of the agents of the defendant, and that plaintiff was free from fault, arises under the statute (chapter 4071, Acts 1891) to the same extent as if plaintiff was not an employee; and it devolves upon the defendant to relieve itself either by showing that plaintiff was at fault, or that its servants were not negligent.

*See notes at end of case.

Florida Cent. & P. R. Co. *v.* Mooney

Adoption of Foreign Statutes—Construction.—Where a statute is adopted from a sister state, any known and settled construction placed thereon by the courts of that state prior to its adoption, not inharmonious with the policy and spirit of the general legislation of the adopting state on the subject, will prevail in construing the statute in the latter state.

Employees—Due Care.*—A servant in the performance of his duties is bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circumstances; and, if he is injured by failure to exercise such care, his master is not liable.

Same—Negligence.†—If, in the performance of his duties, the servant has no instructions to pursue a particular method, and two or more methods are open to him, he cannot be said to have been negligent if he in good faith adopts that method which is more hazardous than another, if the one adopted be one which reasonable and prudent persons would adopt under like circumstances.

Same—Same—Shifting Cars.—Shifting cars by means of the "kicking back" process is not necessarily at all times an act of negligence *per se*, even though there may be a safer method of shifting them.

Same—Same—Same—Exemplary Damages.—In actions for negligence, where there is no evidence tending to show negligence of so gross and flagrant a character as to evince a reckless disregard of human life, or of the safety of those exposed to its dangerous effects, or that entire want of care which would raise the presumption of a conscious indifference to consequences, or to show wantonness and recklessness, or reckless indifference to the rights of others equivalent to an intentional violation of them, exemplary damages cannot be awarded.

(Syllabus by the Court.)

ERROR by defendant to Levy county circuit court. *Reversed.*

The defendant in error recovered judgment against plaintiff in error for $5,000 in the circuit court of Levy county, on November 28, 1894, from which this writ of error was taken.

Case Stated. The declaration, filed February 22, 1894, claimed damages for personal injuries sustained by plaintiff March 1, 1893, upon defendant's railroad at Cedar

*See notes at end of case.

†See Moore *v.* Kansas City, Ft. S. & M. Ry. Co. (Mo.), *ante* and *note*.

Keys. It alleged that plaintiff was employed by defendant as train shifter at that point, to take charge of incoming trains, and, in accordance with instructions from its depot agent, to place cars on the side track, take others therefrom, rearrange cars in and make up outgoing trains; that, in discharging such duties, plaintiff performed the same kinds of labor ordinarily performed by conductors, brakemen, and flagmen on freight trains, and had as a co-laborer a shifting engineer who had charge of the engine, and whose duty it was to watch for plaintiff's signals, and at once obey them; that while plaintiff, on said day, was with reasonable care faithfully discharging his duties in the most accustomed and practicable manner, his leg and fingers were crushed and mangled by defendant's train; that the injuries were caused by defendant's negligence in not providing necessary, suitable, and practicable arrangements and conveniences for plaintiff to safely discharge his duties, and by the negligence of defendant's shifting engineer in failing to obey plaintiff's signal to stop the engine and cars in time to have prevented the injury.

The defendant's pleas, filed November 28, 1894, upon which issue was joined, alleged: (1) That it was not guilty. (2) That plaintiff had for years been in defendant's employment as train shifter at Cedar Keys, was well acquainted with all dangers incident to shifting cars in and around defendant's track at that point, and with the condition and location of the switch, platform, and tracks, which were then in the same condition as they had been for years prior thereto; that, on the date alleged, defendant's train, on its arrival at Cedar Keys, was turned over to plaintiff; that one N. F. Launt acted as hostler in charge of the engine; that plaintiff took charge of the train to shift same, and, while it was backing, plaintiff jumped off a car to a switch platform which was wet; that he fell under the car, and it passed over him, causing the injury; that the accident was due wholly and entirely to plaintiff's negligence, and not to any negligent act of the defendant or any of its servants or agents. (3) That plaintiff's injury was not due to the negligence of defendant's servant who had charge of the engine that was backing the train, but was entirely the result of an accident, for which defendant was in nowise responsible.

It appears from the evidence that the injury occurred on March 1, 1893, shortly after 7 o'clock, about three-quarters of an hour after the train arrived; that defendant's warehouse

and depot at Cedar Keys was located on a wharf some distance from the shore; that about 60 feet from the shore, out on the trestle, a side track ran into the main track, and the switch for this side track was operated on a platform about 12 or 15 feet square, situated about 10 feet from the ground underneath; that on this occasion the ground underneath was dry, though at high tide it was always covered with water. In shifting cars and making this switch, certain signals were in use between plaintiff and Launt, the shifting engineer; and previous to this time the signals had always been understood and obeyed by the engineer in shifting cars in the same position on the same tracks. On the evening in question, plaintiff had to use a lantern to see what he was doing, on account of the darkness. The train was composed of the engine, a box car, a flat car, an express car, and passenger coaches, in the order named. Plaintiff was required to run the express car and coaches down on the main track, towards the shore, past the switch, and the remainder of the train, with the engine, out on the side track, towards the shore, for a car to be brought back upon and backed down the main track, and attached to the express car and coaches. The train backed out from the depot. Plaintiff was on the platform of the express car next to the engine, and, when the platform of the express car was about three car lengths from the switch, plaintiff pulled the pin, disconnecting the flat car and express car, and signaled the engineer, with his lantern, to stop. The flat car and express car parted company. The engineer slowed up, but did not stop. When the platform of the express car was opposite the platform of the switch, plaintiff stepped to the switch platform, and fell. The express car and passenger coaches passed on, and the cars attached to the engine passed over plaintiff's limbs, and dragged him along the switch platform until he fell on the ground underneath. This process of shifting cars, known as "kicking cars," was very dangerous, though, according to plaintiff's testimony, it was universally practiced on all railroads, and he had no instructions not to shift cars in this manner. Plaintiff had all night in which to perform this work; had the entire control of the work, the engineer being subject to his orders. There was another and less dangerous, but less expeditious, method of shifting these cars in the manner desired, but it had never been practiced by plaintiff at this point. The following printed rules of the company, known to plaintiff

prior to the injury, were in evidence: "Stepping upon the front of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between cars while in motion to uncouple them, and all similar imprudences, are dangerous, and in violation of duty. * * * The company does not wish or expect its employees to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of their superiors or otherwise." There was evidence tending to show that plaintiff had been often warned by defendant's depot agent, though not in his official capacity or as a representative of the company, of the danger incident to making "running switches" or "kicking cars"; that the engineer on this occasion did not see any signal either to stop or slow down, but that, in accordance with his previous custom in such cases, he did slow down when he got to what he thought was the proper distance from the switch, and kept backing the train slowly until it passed over the switch, when he ascertained for the first time that plaintiff was hurt; that it was understood between plaintiff and the engineer before the train left the depot that the engine was not to stop, but only to slow down at a certain point; that this understanding was carried out by the engineer; that signals to stop were always given from the switch platform, and the engineer was never on the lookout for a signal from the car platform. The plaintiff was asked, "How long had Ned Launt been shifting engines at Cedar Keys before the injury?" Defendant objected to this question, upon the ground that same was impertinent, did not tend to prove any of the issues in the cause, and tended only to show the competency or incompetency of the engineer. The objection was overruled and the witness answered, "About two or three weeks, but I don't know exactly."

At plaintiff's request the court instructed the jury that: (1) If they believed from the evidence that, at the time the plaintiff was alleged to have been hurt, he had not been guilty of fault or negligence, and that he was injured by the fault or negligence of the engineer, they should find for the plaintiff. (2) If they believed from the evidence that, at the time the plaintiff was alleged to have been hurt, he had not been guilty of negligence or fault, unless the company made it appear that the engineer exercised all ordinary and

reasonable care and diligence, the presumption in such case being against the company, they must find for the plaintiff.

At defendant's request the court instructed the jury that: (1) A railroad employee always assumes the ordinary risks of his employment, and, if you find from the evidence that the plaintiff was injured as a result of the ordinary risks run by men of like employment, you must find for the defendant. (2) The fact that employees of a railroad company were in the habit of switching in a peculiarly dangerous manner, when the switching might be done in another and less dangerous manner, does not excuse a man in following such dangerous custom, unless he does so by express orders of his superior officer. If, therefore, an employee assumes without special orders to follow such peculiarly dangerous custom, he assumes the risk; and, if he is injured, he cannot recover.

The court charged the jury of its own motion as follows:

"The charges requested by counsel in this case, and which have been given to you by the court, are so meager that I do not consider them as covering the entire law of the case. I shall therefore supplement the charges which have been given to you by giving you another charge,—the act of the legislature which governs this case. I shall read to you chapter 4071 of the Acts of 1891, as follows:

" 'Section 1. A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

" 'Sec. 2. No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.

" 'Sec. 3. If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by negligence of another employee and without fault or negligence

on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding.' "

The court further instructed the jury of its own motion: "As to the damages to be allowed in this case, in the event that you should find for the plaintiff, there are two kinds of damages to which I can call your attention. Damages are either compensatory or punitive. Compensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering. Exemplary, vindictive, or punitory damages are such as blend together the interests of society and of the aggrieved individual, are not only a recompense to the suffering, but also a punishment to the offender and example to the community. But punitive or exemplary damages can only be allowed in peculiar cases. Exemplary damages can be allowed in cases of negligence only where the negligence is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness, recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."

The defendant requested the following instructions, which were refused: "(1) To entitle the plaintiff to recover, he must show that the injury was caused by the negligence of the engineer, and also without any fault on his own part. (2) Unless the plaintiff has shown both negligence on the part of the engineer, and that he was himself without fault, you cannot give him a verdict. No amount of sympathy for him or his family can justify you in giving him damages. (3) If you find from the evidence that the plaintiff was injured while performing a dangerous work, and that he could have done the work in a less dangerous way, but that he voluntarily chose a more dangerous way, and was injured in consequence, that he is not entitled to recover, and you must find in favor of the defendant. (4) I charge you that if the evidence shows you that the defendant voluntarily undertook to do the work, in the performance of which he was injured, in a manner in which he had been warned against by an

official of the company, and that he might have done the work in a less dangerous manner, then he was guilty of what the law calls 'contributory negligence,' and he cannot recover, even though the engineer was in fault."

The defendant excepted to the following rulings of the court, and has here assigned them as error: Overruling objections to the question propounded to plaintiff as a witness, "How long had Ned F. Launt been shifting engines at Cedar Keys before the injury?" giving the second instruction requested by the plaintiff; refusing the first, second, third, and fourth instructions requested by defendant; giving its own instructions upon the subject of punitive or exemplary damages; and giving, in its charge to the jury, sections 1 and 2, c. 4071, Acts 1891. Other facts of the case are stated in the opinion.

Fletcher & Wurts, for plaintiff in error.

CARTER, J. (after stating the facts). I. The court did not err in overruling objections to the question propounded to plaintiff, "How long had Ned F. Launt been shifting engines at Cedar Keys before the injury?" Launt was the engineer in charge of the engine at the time of the accident. It was his alleged negligence which caused plaintiff's injury. The length of his service as shifting engineer at this point was material as bearing upon his knowledge of the location and situation of the main tracks, side tracks, switches, the methods of operating them and of shifting cars at this particular place, as well as the customary duties of the men employed thereat, and the system of signaling in use by them. The question had no tendency to elicit testimony as to the engineer's competency, as argued by plaintiff in error. It did not inquire how long Launt had been a shifting engineer, but how long he had been shifting engines at this particular place. It tended to elicit evidence showing a knowledge upon the part of the engineer of his surroundings, and the conditions existing at the time of the accident, and it can never be irrelevant or impertinent to prove a knowledge on the part of one alleged to have been negligent of those surroundings and circumstances which enter into, and often control, the question as to whether such person has failed to exercise proper care.

Negligence—Evidence.

II. There was no evidence tending to show any negligence on the part of the defendant in failing to provide necessary,

suitable, safe, or practicable arrangements and conveniences for the plaintiff as its train shifter at Cedar Keys, but only that plaintiff's injuries were caused by negligence of defendant's shifting engineer. What we decide in this case, therefore, has no reference to a case where the master's own negligence, and not that of his employee, causes injury to another employee. It is admitted in the declaration, and clearly shown by the evidence, that plaintiff and Launt were co-employees, engaged in the same common work; and, independent of statutory enactments, the defendant, their employer, would not be liable to either for injuries caused by the negligence of the other, in the course of such employment. Camp *v.* Hall, 39 Fla. 535, 22 South. 792, and cases therein cited.

Injury to Employee—Negligence of Co-Employee—Contributory Negligence—Apportionment of Damages.

In 1887 our legislature passed chapter 3744, approved June 7, 1887, entitled "An act to apportion the damages in actions against railway companies by persons and employees, and to provide for such recovery of damages against said railway companies by its employees." This act contained only two sections, and is quoted in full in Duval *v.* Hunt, 34 Fla., at text, p. 104, 15 South. 879. In 1897 the legislature passed chapter 4071, approved May 4, 1891, entitled "An act defining the liabilities to railroad companies in certain cases." The first, second, and third sections of this act are quoted in the court's charge to the jury in this case; the fourth section in express terms repeals chapter 3744, Acts 1887; and the fifth section puts the act into effect from its passage. It was held by this court in Duval *v.* Hunt, *supra*, that the act of 1887 was adopted from the statutes of our sister state, Georgia, and that any known or settled construction placed thereon by the courts of that state prior to its enactment in this state, not inharmonious with the policy and spirit of our own general legislation on the subject would prevail in construing the statute in this state. It was further ruled in that case, in conformity to decisions from the supreme court of Georgia construing their statute, that the apportionment of damages authorized by the first section of our act of 1887, in cases where both parties were at fault, had no application to the cases provided for by the second section, and that, in cases embraced within said second section, the employee injured by the negligence of another employee, in order to recover against the employer, must himself be entirely free from fault. The second and third

sections of the act of 1891 are substantially but re-enactments of the acts of 1887, so far as they apply to the facts of this case, although there are some changes in the phraseology. But the act of 1891, by section 1, enacts a provision entirely new to the statutory laws of this state, but which we find is in the state of Georgia a part of the same statute from which section 2 of our original act of 1887 was, in Duval *v.* Hunt, *supra*, declared to have been taken. This provision stands as section 3033 of the Georgia Code of 1882, in language identical with the first section of our act of 1891. The supreme court of Georgia in Campbell *v.* Railroad Co., 53 Ga. 488, held that, under the provisions of sections 3033 of the Code (corresponding to the first section of our act of 1891), an employee embraced within the provisions of their Code, § 3036 (corresponding with the second section of our act of 1887, and third section of our act of 1891), in order to recover damages, must show that his injury was caused without fault or negligence on his part, but that the company must prove that its agents have used proper care and diligence. In the case of Thompson *v.* Railroad Co., 54 Ga. 509, the previous decision seems to have been overlooked until after the latter case was disposed of; and it was there held that the statute placed the burden upon the company to defeat plaintiff's right of recovery, either by showing that plaintiff was negligent, or that its agents were not negligent. In subsequent decisions, the two cases above referred to were reconciled; and it was declared that in suits by an employee to recover damages from his employer for injuries alleged to have been inflicted by the negligence of another employee in performing some act in the master's service, in the performance of which plaintiff, as a co-employee, was participating, the plaintiff must show either that he was free from fault himself, or that there was negligence on the part of his co-employee; that, upon proof of the fact that plaintiff in such a case was free from fault, the statutory presumption arose that the servants of the company were at fault, and it thereupon devolved upon the company to "make it appear" to the contrary. If, however, the act by which, the employee was injured was one being performed by other employees in the master's business, but in the performance of which plaintiff was not participating, then the presumption of negligence on the part of the agents of the company, and that plaintiff was free from fault, arose under the statute, to the same extent as

Same—Burden of Proof.

Same—Same—Negligence of Another Employee.

if the plaintiff was not an employee, and it devolved upon the company to relieve itself, either by showing that plaintiff was at fault, or that its servants were not negligent. Railway Co. *v.* Campbell, 56 Ga. 586; Railroad Co. *v.* Kelley, 58 Ga. 107; Railroad Co. *v.* Kenney, Id. 485. This construction of the statute was well settled in Georgia, long before the provisions of our act of 1891 were adopted in this state, and is still adhered to, as will be seen by reference to the following decisions: Railroad Co. *v.* Sears, 59 Ga. 436; Railroad Co. *v.* Roach, 64 Ga. 635; Railroad Co. *v.* De Bray, 71 Ga. 406; Railway Co. *v.* Barber, Id. 644; Railroad Co. *v.* Ivey, 73 Ga. 499; Railroad Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; Railroad Co. *v.* Bryans, 77 Ga. 429; Railroad Co. *v.* Small, 80 Ga. 519, 5 S. E. 794; Railroad Co. *v.* Nash, 81 Ga. 580, 7 S. E. 808; Railroad Co. *v.* Vandiver, 85 Ga. 470, 11 S. E. 781; Railroad Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82. Following our ruling in the case of Duval *v.* Hunt, *supra*, we think this construction placed upon the statute by the supreme court of the state of Georgia is binding upon us in the present case. The plaintiff having been injured by the alleged negligence of a co-employee in performing an act about defendant's business, in which plaintiff, as an employee, was participating, no presumption of liability arises against the defendant until it is shown either that plaintiff was not at fault, or that his co-employee was. The second instruction on behalf of plaintiff was, as applied to these facts, correct, and there was no error in giving it.

Adoption of Foreign Statutes—Construction.

The first and second instructions requested by defendant were properly refused, because they required plaintiff to prove that he was without fault, and that defendant's agent was negligent, without giving him the benefit of the statutory presumption upon proof of one of these facts only.

The court said to the jury that the instructions given on behalf of the plaintiff and defendant did not cover the entire law of the case, and then proceeded to charge them in the language of the first three sections of the act of 1891. It was error to give without qualification or explanation the broad language of the first and second sections of that act, for the language of the first section was calculated to impress the jury with the idea that all presumptions were against the company, and that it devolved upon it to make it appear that its agents had exercised all ordinary and reasonable care and diligence, while, as we have seen, in a suit of this

character by an employee, no presumption against the company arises, nor is it required to "make it appear" that its agents have exercised proper diligence until and after plaintiff has shown either that he himself was without fault, or that his injuries were caused by the negligence of a co-employee. The language of the second section of the act of 1891 was calculated to impress the jury with the idea that they could apportion the damages between plaintiff and defendant in case they found that the plaintiff and the defendant's agents were both at fault; whereas, as we have seen, there can be no apportionment of damages in a case of this kind. In order for an employee to recover, he must be free from fault. Duval *v.* Hunt. *supra.*

III. The third instruction requested by defendant was properly refused. It is sought to be sustained in this court upon the theory that the facts therein stated would constitute contributory negligence. The language of this instruction is apparently approved in many decisions, most of which are collected in Bailey's Personal Injuries, Relating to Master and Servant (volume 1, p. 392 *et seq.*). As an abstract proposition, we do not think this instruction can be sustained upon principle. The servant, in the performance of his duties, is bound to exercise ordinary care, or that degree of care which prudent persons usually exercise under similar circumstances; and, if he is injured by failure to exercise such care, his master is not liable. Wood, Mast. & S. § 372. If, in the performance of his duties, two or more methods are open to him, and he has no instructions to pursue one in particular, he necessarily must choose between them; and he cannot be said to have been negligent if he in good faith adopts that which is more hazardous than another, provided the one pursued be one which reasonable and prudent persons would adopt under like circumstances. Any other rule would require the servant to be measured by the standard of very prudent persons, for only extremely cautious persons ordinarily adopt the least hazardous course where both are considered safe and appropriate. For this reason it cannot be held as a matter of law that in all cases where a servant is injured while pursuing a method voluntarily adopted by him, more hazardous than other available methods, he is guilty of contributory negligence; for *non constat* the method pursued may be one which prudent persons

Employees—Due Care.

Choosing Dangerous Method.

would ordinarily exercise under like circumstances. Ordinarily, the question of contributory negligence is one of fact for a jury, under proper instructions from the court; and it is only in those cases where the conclusions and inferences to be drawn from facts in evidence are indisputable, involving a common instinct of mankind,—self-preservation,—that it becomes a question of law. Railroad Co. *v.* Yniestra, 21 Fla. 700. As applied to the facts of the present case, this instruction told the jury that if the plaintiff voluntarily undertook to perform his duties of shifting cars by means of "running switches", instead of pursuing another method less dangerous, he could not recover for personal injuries received by him. Shifting cars by means of the "kicking back" process is not necessarily and at all times an act of negligence *per se*. As against persons other than employees, where the process is not guarded by proper precautions, such as ringing bells, stationing flagmen at crossings, brakemen on the end of the train, and the like, it is, as a matter of law, negligence to shift cars in this manner; but there is no doubt that it may be performed with perfect safety to employees and third persons by exercising proper precautions. This instruction did not convey the idea that defendant would not be liable if this process was one which prudent persons under the circumstances surrounding the parties at the time would not usually have exercised, or that at this particular time and place it was imprudent to attempt it, or that plaintiff was not exercising due care commensurate with his surroundings in performing his duties connected therewith. It assumed as a matter of law, not that making a running switch was in itself an act of negligence, but that it was negligence on this occasion only because there was a safer way to shift the cars. The plaintiff testified that this method was universally practiced upon all railroads, had always been used upon defendant's road at Cedar Keys, and that he had never known the safer method to be used by any railroad man. The defendant introduced no evidence to disprove these statements, except that of the engineer, Launt, who testified that this method was "known to railroad men to be very dangerous, but it is generally done in that way. I have seen very careful men who would not kick the cars when they could help it, but very few of them. They generally kick the cars." There is nothing in the evidence from which the court could say that, as a matter of law, the plaintiff did not exercise

Shifting Cars.

due care in selecting the "flying switch," or more dangerous method of shifting cars. That was a question for the jury to determine, under proper instructions from the court. Railway Co. *v.* French, 56 Kan. 584, 44 Pac. 12.

IV. The court properly refused defendant's fourth instruction. This instruction was similar to the one considered in the preceding paragraph of this opinion, except that it embraced the idea that the method of shifting cars adopted by plaintiff was one against which he had been warned by an official of the company. There was no evidence that any official of the company, in his official capacity, had ever given plaintiff such warning. The defendant's depot agent at Cedar Keys had often told plaintiff of the dangers involved in this process. He is not shown to have had any authority to prescribe the manner in which plaintiff's work was to be done, nor to forbid his doing it in any particular manner. All that he said was in the way of friendly advice to a personal acquaintance, and not as possessing authority from the company. There was no evidence that plaintiff was disobeying defendant's instructions at the time of his injury, and this charge was therefore properly refused.

V. There was no evidence upon which to base a charge for exemplary damages. There was nothing to show a malicious or intentional injury inflicted upon plaintiff; neither was there any evidence tending to show that the engineer was guilty of negligence of so gross and flagrant a character as to evince reckless disregard of human life, or of the safety of those exposed to its dangerous effects, or that entire want of care which would raise the presumption of a conscious indifference to consequences, or to show wantonness and recklessness, or reckless indifference to the rights of others equivalent to an intentional violation of them, which is necessary to justify a jury in inflicting punitive damages. Railway Co. *v.* Hirst, 30 Fla. 1, 11 South. 506; Navigation Co. *v.* Webster, 25 Fla. 394, 5 South. 714. The evidence showed, at most, that plaintiff gave a signal to stop the train; that the engineer did "slow down," but failed to come to a full stop. The signal was given from the car steps, instead of the switch platform, and the engineer testified (and was not contradicted) that he did not see the signal; that he was never on the lookout for a signal from the car steps, but only from the switch platform; and that it was understood between him and plaintiff before they left the depot that he was not to stop the train, but only to "slow

Same—Same—Exemplary Damages.

down." The engineer did stop the instant he ascertained that plaintiff was hurt. There was nothing in the facts to show negligence of a gross or flagrant character, nor to warrant the infliction of any damages by way of punishment. Navigation Co. *v.* Webster, 25 Fla. 394, 5 South. 714.

The judgment is reversed, and a new trial awarded.

NOTES.

Fellow Servants—Florida Statute of 1887.—The act of June 7, 1887, changing the common law rule of the liability of railroad companies for an injury resulting to one employee through the negligence of another is adopted from the statutes of Georgia and according to the well-settled rule, any known and settled construction placed upon the statute by the courts of that state, is adopted also, so far as it is not in conflict with the spirit and policy of the general legislation of Florida on the same subject. Duval *v.* Hunt, 34 Fla. 85, 15 So. Rep. 876.

Section 2 of the above statute provides that if one employee is injured by another employee, "and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery." *Held*, that an injured employee cannot recover unless he is entirely free from fault himself. Duval *v.* Hunt, 34 Fla. 85, 15 So. Rep. 876.

Under this provision of the statute an employee cannot recover damages from the company for injuries sustained by him on account of the negligence or carelessness of another employee, unless wholly without fault himself, even though in performing the act that results in the injury he was acting under the orders of a superior. Duval *v.* Hunt, 34 Fla. 85, 15 So. Rep. 876.

Where an employee uses defective and dangerous tools and appliances, with knowledge of their defectiveness and dangerousness, and is injured thereby, he cannot be said to be without fault, and cannot recover of the company, under this statute, even though his use of them was by the direct command of a superior officer, who was also an employee of the same company. Duval *v.* Hunt, 34 Fla. 85, 15 So. Rep. 876.

Injury to Employee—Burden of Proof.—Where a railroad employee sues to recover for personal injuries, claimed to have resulted from negligence of the company, the burden is on him to prove such negligence. Crew *v.* St. Louis, K. & N. W. R. Co., 20 Fed. Rep. 87; Mobile & M. R. Co. *v.* Smith, 59 Ala. 245; Chattanooga, R. & C. R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. Rep. 853; Way *v.*

Illinois C. R. Co., 40 Iowa 341, 8 Am. Ry. Rep. 400; Muirhead *v.* Hannibal & St. J. R. Co., 19 Mo. App. 634; Texas & N. O. R. Co. *v.* Crowder, 63 Tex. 502; International & G. N. R. Co. *v.* Hester, 72 Tex. 40, 11 S. W. Rep. 1041; Texas & N. O. R. Co. *v.* Crowder, 76 Tex. 499, 13 S. W. Rep. 381.

The burden of proof is upon the employee to show both the negligence of the company and his own care. But he is not bound to do more than raise a reasonable presumption of negligence on the part of the company. Greenleaf *v.* Illinois C. R. Co., 29 Iowa 14; Bennett *v.* Northern Pac. R. Co., 2 N. Dak. 112; Cooper *v.* Pittsburg, C. & St. L. R. Co., 24 W. Va. 37.

An instruction that the burden is on plaintiff to show that he was injured through the company's negligence, and not through any fault of his own, in which case the burden of proof is shifted to the company; and that if it can then show that plaintiff then contributed to the injury or that it exercised ordinary care, plaintiff cannot recover; and that if the company shows that plaintiff was at fault, that the injury was not caused by its negligence, or that plaintiff could have avoided the injury by exercising ordinary care, plaintiff cannot recover, is, taken as a whole, substantially correct. Chattanooga, R. & C. R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. Rep. 853.

In an action under section 2590, Ala. Code of 1886, by an employee against the company for personal injury received in his duty of moving cars, the burden of proving negligence on the part of the company lies on the plaintiff. Mobile & B. R. Co. *v.* Holborn, 84 Ala. 133, 4 So. Rep. 146.

Contributory Negligence of Employee.—See Alabama G. S. R. Co. *v.* Roach (Ala.), 11 Am. & Eng. R. Cas., N. S., 869 and extensive *note*, in which the cases are collected.

HOUSTON & T. C. R. CO.

v.

QUILL *et al.*

(*Supreme Court of Texas, Dec. 12, 1898.*)

Assumption of Risk—Conflicting Decisions—Jurisdiction.*—A decision to the effect that a locomotive engineer assumes the risk of

*As to Assumption of Risk of Collision with Cattle, see Bowes *v.* Hopkins *et al.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 641 and *note*, p. 648.

cattle being upon an unfenced track, and that a track fenced on each side of the right of way, but without cattle guards, is in effect unfenced, is not in conflict with one declaring that an engineer does not assume the risk of cattle getting upon a fenced track through the failure of the company to repair its fence.

ERROR by defendant to court of civil appeals of Fourth supreme judicial district. *Dismissed.*

Baker, Botts, Baker & Lovett and *Frank Andrews*, for plaintiff in error.

A. H. Willie & Sons and *O. T. Holt*, for defendants in error.

DENMAN, J. "This suit was brought by appellant Kate Quill, for herself and as next friend of her minor daughter, Mary, and by Katherine Quill, the mother of deceased, against appellee, to recover damages for the death of James Quill, the husband of Kate and father of Mary Quill. It was alleged by plaintiff that in January, 1886, James Quill, while a locomotive engineer operating one of appellee's engines, was killed by the derailment of the engine, which derailment was caused by a collision with cattle which had entered upon appellee's railroad track through the negligence of appellee to keep its fence along its right of way in repair. The appellee (defendant below) answered by a general denial, a plea of contributory negligence, and that deceased at the time he was killed knew that cattle were frequently on appellee's track at places where the road was inclosed, and therefore the danger, if any, in operating the train over the track with cattle upon it, was one of the ordinary risks incident to his employment, and such as was assumed by him when he accepted service from appellee as locomotive engineer. There was a trial by a jury, with peremptory instruction from the court; and a verdict was returned for appellee, upon which the judgment appealed from was entered." After making the above statement the court of civil appeals reversed and remanded for a new trial, holding (1) that under the evidence it was a question for the jury to determine "whether deceased had knowledge of the frequent occurrence of cattle upon appellee's railroad track at places where it was fenced"; and (2) "while it may not be the duty of a railroad company to servants operating its trains to inclose its roadbed, yet if the company, after having fenced it, negligently permits its fence to become so out of repair

that stock can enter upon the track, and if the danger to its employees incident to operating its trains is by such negligence increased, and if, by reason of such increased risk, one of such employees is injured by the derailment of an engine caused by its collision with stock entering upon the track on account of such defective fence, the company would, in our opinion, be liable in damages for the injury thus occasioned its employees. An engineer accepting employment to operate an engine over a railroad which is inclosed assumes only such risks as are ordinarily incident to operating an engine over an inclosed road, and has the right to assume that the road is properly fenced, and the fence in proper repair, and to act upon such assumption in running his engine. And he cannot be held to have assumed the risk of his engine being derailed by collision with cattle on the track, unless he knew during the course of his employment that the inclosure was so defective as not to prevent cattle from entering upon the track."

The company applied to this court for a writ of error, contending that it has jurisdiction, for the reason that the opinion of the court of civil appeals is in conflict with Ward *v.* Bonner, 80 Tex. 168, 15 S. W. 805; and upon this ground we entertained jurisdiction. Upon more mature consideration, we are of opinion that such conflict does not exist. The question decided in Ward *v.* Bonner was that the engineer assumed the risk of cattle being upon an unfenced track, the court treating a track with fences on each side of the right of way, but with no cattle guards at each end to prevent cattle from going onto the right of way, as being unfenced; whereas the question decided by the court of civil appeals in the case before us is that the engineer did not assume the risk of cattle getting upon a fenced track through the negligence of the company in allowing the fence to be out of repair, unless he knew that it was in such condition. The question of law, as to whether the fact that the company had fenced its track reduced the risks assumed by the engineer, as held by the court of civil appeals, was not involved in the case referred to above. For the same reason the opinion does not conflict with that of the court of civil appeals in Manson *v.* Eddy, 3 Tex. Civ. App. 148, 22 S. W. 66. It results that we have no jurisdiction of this reversed and remanded cause, and therefore the order of this court heretofore made granting the application for writ of error is set aside, and the application is dismissed, for want of jurisdiction.

WESTERN & A. R. CO.

v.

BAILEY.

(*Supreme Court of Georgia, July 22, 1898.*)

Employee Injured by Corpse of Trespasser Negligently Killed—Liability of Company.*—If an engineer, while running a train, saw a trespasser upon the track in time to stop before striking him, but nevertheless, "carelessly, negligently, recklessly, and wrongfully, allowed and permitted" the train to "run at a reckless and dangerous rate of speed without any bell or whistle being sounded, or without any other danger or alarm signal being given, or without any effort to stop said train being made," and the trespasser was thus killed, and if his body was hurled against an employee of the railroad company, who was free from fault or negligence, and in his proper place, performing his duties as a servant of the company, and he was in this manner injured, he had a cause of action against the company.

(Syllabus by the Court.)

ERROR by defendant from Whitfield county superior court. *Affirmed.*

Payne & Tye and *R. J. & J. McCamy*, for plaintiff in error.

Marchbanks & Matthews and *B. Z. Herndon*, for defendant in error.

LITTLE, J. It may be stated as a general rule that one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser. 3 Elliott, R. R. § 1252. It may be also stated as a general rule that the company owes no duty to a trespasser upon its track, except to do him no willful or wanton injury. A trespasser is a wrongdoer, and it is a general principle of jurisprudence that the courts will not aid a

*See Wood *v.* Pennsylvania R. Co. (Pa.) 5 Am. & Eng. R. Cas., N. S., 672 and *note*, p. 678.

wrongdoer. The facts that the trespasser is a wrongdoer does not, however, justify malicious, wanton, or willful maltreatment of him; and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of wantonness or willfulness. But neither negligence nor willfulness can ordinarily be shown in this way where an adult, or person apparently able to take care of himself, is upon the track, because the railroad employees have a right to assume, in the absence of anything to the contrary, that he will get off the track, or take such other precautions as may be available to avoid injury to himself. Id. § 1253, and authorities cited. If, after discovering the danger to the trespasser, and his inability to escape, the company fails to exercise reasonable care, it will be liable, if the exercise of such care would have prevented the injury; and, although there is a clear distinction between negligence and willfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to willfulness, although there is no direct proof of actual intention to inflict the injury complained of. Id. § 1257, and authorities cited; Railroad Co. *v.* Denson, 84 Ga. 782, 11 S. E. 1039. In the case of Railroad Co. *v.* Vaughan, 93 Ala. 209, 9 South. 468, where a trespasser was seen by the engineer upon a long trestle in time to have stopped the train, and the latter did nothing to stop or slacken the speed of the train, but went on, speculating on the chances of the trespasser's reaching the end of the trestle before the train arrived there, although it must have been apparent that the trespasser could not escape, it was held that the engineer was guilty of such recklessness as amounted to willfulness, and that the company was liable for running over and killing such trespasser while upon the trestle, regardless of his contributory negligence. The presumption that a person, apparently of full age and capacity, who is walking or standing on the track, will leave it in time to save himself from harm, will not avail when the person who is on the track appears to be intoxicated, asleep, or otherwise off his guard, etc. Pierce, R. R. p. 331, and authorities cited. A like doctrine is announced in the case of Railroad Co. *v.* Brinson, 70 Ga. 207. The company is at liberty to act on this presumption, and to continue to act on it, until it discovers that the person is not likely to escape the peril, and then it is bound to exert itself to avoid the calamity. Railroad Co. *v.* Williams, 74 Ga. 736. In the case of Railroad

Co. *v.* Brinson, *supra*, it is held: "One who walks upon a railroad track, not at a road crossing, is a trespasser thereon; and while the road would be liable for a wanton or willful wrong of its agents, acting within the scope of their duty, or for gross negligence or carelessness, evincing reckless disregard of the safety of others, or where they perceive the danger of a party in time, and make no effort to avoid it, still the company is under no such obligation to a trespasser as to those who are properly and lawfully upon its premises," etc. See, also, Railway Co. *v.* Stewart, 71 Ga. 427; Railroad Co. *v.* Meigs, 74 Ga. 857.

According to these authorities, the petition, which, under the demurrer, must be taken as true, shows that the railroad company was guilty of willful or wanton negligence in allowing the engine in charge of its servants to collide with or run against the unknown man; and, thus being negligent, this act on its part must be held the proximate and sufficient cause of the injury which the plaintiff sustained by reason of the body of the unknown man being hurled, per force of the blow inflicted by the engine, against him. The negligence of the defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto; and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, there was no new and independent force, acting in and of itself, causing the injury, and superseding the original wrong, so as to make it remote in the chain of causation; there was no interposition of a separate independent agency, over which the defendant neither had nor exercised control. Perry *v.* Railroad Co., 66 Ga. 746; Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285. In the case of Railroad Co. *v.* Chapman, 2 South. 738, where a plaintiff, while walking along the track of a defendant's road, observed an approaching train, and stepped down on the embankment just before the train came along, and as the train came opposite to where plaintiff was standing a cow came up on the other side of the embankment, was thrown from the track by the engine, "bounced down" and struck the plaintiff, injuring her, it was held that, if the animal was thrown from the track by the negligence of those in charge of the train, the injury could not be regarded as a purely accidental occurrence, for which no action lies, but must be deemed to have been proximately caused by the negligence. In the opinion the court said: "When the cow was thrown by the engine, it struck the ground,

bounced and fell against plaintiff. The bounce and fall of the cow was the immediate cause, but it was merely incidental, and was not an independent agency which had no connection with the act of the defendant. The direct cause was put in operation by the force of the engine, which continued until the injury; and injuries directly produced by instrumentalities thus put in operation and continued are proximate consequences of the primary act, though they may not have been contemplated or foreseen. The relation of cause and effect between the primary cause and the injury is established by the connection and succession of the intervening circumstances,"—citing Railroad Co. *v.* Lockhart, 79 Ala. 315; Railroad Co. *v.* Arnold (Ala.) 2 South. 337. The same principle was recognized and applied in the case of Akridge *v.* Railroad Co., 90 Ga. 232, 16 S. E. 81, where the plaintiff was held entitled to recover for injuries sustained by him from being violently thrown against a tree by a horse which the railroad had negligently frightened. The court committed no error in overruling the demurrer to the petition, and the judgment must be affirmed.

BARRETT

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, Dec. 22, 1898.*)

Injury to Employee—Defective Rail—Negligence.*—The end of one of the rails in defendant's side track was battered down, spread out, and split or splintered so that it projected inward five-eights of an inch for a distance of three inches along the rail. Plaintiff, an employee of the defendant, attempted to couple the pilot bar of an engine to a freight car, but failed to do so; and in attempting to step backward off the side track, out of the way of the slowly-moving engine, the leg of his pants was caught near the heel by said projection, and his leg was held and crushed by the wheel of the engine. *Held*, defendant was not guilty of negligence in permitting this slight projection to remain on the rail.

(Syllabus by the Court.)

*See note at end of case.

Barrett *v.* Great Northern Ry. Co

APPEAL by plaintiff from Wright county district court. *Affirmed.*

F. E. Latham, for appellant.
W. E. Dodge, for respondent.

CANTY, J. Plaintiff was a conductor on defendant's freight train. About a mile south of Granite Falls, in this state, there is on defendant's railroad a side track sufficiently long to accommodate 40 or 50 freight cars. At the time in question, plaintiff's train stopped at this side track in order to pass in upon the same, and let another train pass by on the main track. Plaintiff opened the switch, and his train passed in to where there were some freight cars standing ahead of the engine on the side track. It was necessary to couple the first of these cars onto the head end of the engine, so that they could be pushed down further on the side track, out of the way of plaintiff's train, in order to give it sufficient room to stand on the side track and clear the main track. As the engine approached this first car, the train was moving about a mile an hour; and plaintiff proceeded to couple the engine to the car. He stepped in between the rails, in front of the engine, and raised up the pilot coupling bar, which ordinarily rests on the middle of the pilot. This bar is about 5 feet long, and weighs about 100 pounds. As the train moved forward he attempted to put the end of the pilot bar into the aperture in the drawbar of the car, but missed it, and the end of the bar glanced off and struck against the wooden drawhead of the car as the pilot of the engine closed in against the car. He instantly stepped back, and attempted to get out of the way, outside of the rail. He stepped backward with his left foot over the rail, but his right foot was caught and run over by the first wheel of the engine before it was stopped. The foot was crushed at the ankle, and had to be amputated. He brought this action to recover damages for this injury. On the trial the court dismissed the action at the close of plaintiff's case, and he appeals from an order denying a new trial.

Plaintiff testified that, as he attempted to draw his right leg over the rail, he felt that his foot was caught and held so that he could not pull it away before the wheel passed over it. He did not know what it was that held his foot. There is evidence tending to prove that the foot was crushed at the rail joint. The space between the ends of the rails was about three-fourths of an inch wide, and a piece of the bone of the

Note

leg was forced down into this space. The end of one of the rails was battered down, spread out, and split or splintered so that it projected inward from one-half to five-eighths of an inch for a distance of about three inches along the rail, and a piece of cloth was found sticking on this projection. It was found that a piece of the leg of the pants, near the heel, was torn out. This piece, it is claimed, corresponds to the piece found stuck in the projection on the rail. It is claimed that the existence of the projection was the proximate cause of the injury, and that defendant was negligent in permitting the projection to remain on the rail in its side track, where the employees were in the habit of coupling and uncoupling cars. This is the only ground of liability on which plaintiff claims the right to recover. We cannot hold that defendant was negligent in permitting the projection to remain on the rail. The side track in question was not used for switching to any great extent, and a railroad company cannot be expected to keep its side tracks free from every little projection which may extend out from the rails, ties, and other parts of its side tracks. There are the ends of the bolts which go through the fish plates, the nuts to fasten the same, splinters from the ties, etc. It would be imposing on the railroad company too high a degree of care to require it to keep all of these little projections trimmed off so that a man would never come in contact with them, and the leg of his pants would not be caught as he moved around over the tracks. This is in accordance with the conclusion reached in Doyle *v.* Railway Co., 42 Minn. 79, 43 N. W. 787. Order affirmed.

NOTE.

Injury to Employee—Liability of Master—Notice of Defect.—Where an employee seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the company, it will not only devolve upon such employee to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice. Atchison, T. & S. F. R. Co. *v.* Wagner, 21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204; St. Louis, I. M. & S. R. Co. *v.* Harper, 44 Ark. 524; St. Louis, I. M. & S. R. Co. *v.* Gaines, 46 Ark. 555; St. Louis, I. M. & S. R. Co. *v.* Rice, 51 Ark. 467, 4 L. R.

A. 173, 11 S. W. Rep. 699; Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. Rep. 371; Colorado C. R. Co. *v.* Ogden, 3 Colo. 499; Columbus, C. & I. C. R. Co. *v.* Troesch, 68 Ill. 545; Kranz *v.* White, 8 Ill. App. 583; Chicago & A. R. Co. *v.* Stites, 20 Ill. App. 648; Louisville, E. & St. L. Con. R. Co. *v.* Allen, 47 Ill. App. 465; Greenleaf *v.* Illinois C. R. Co., 29 Iowa 14; Atchison, T. & S. F. R. Co. *v.* Ledbetter, 21 Am. & Eng. R. Cas. 555, 34 Kan. 326, 8 Pac. Rep. 411; Elliott *v.* St. Louis & I. M. R. Co., 67 Mo. 272; Covey *v.* Hannibal & St. J. R. Co., 28 Am. & Eng. R. Cas. 382, 86 Mo. 635; Bailey *v.* Rome, W. & O. R. Co., 19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585; Humphreys *v.* Newport News & M. V. Co., 39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39; Johnson *v.* Chesapeake & O. R. Co., 36 W. Va. 73, 14 S. E. Rep. 432.

The rule exonerating a company having no knowledge of the defects in question, applied to the case of an injury caused by a splinter on side of rail catching employee's foot. Doyle *v.* St. Paul, M. & M. R. Co., 41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787. See also Pittsburgh, C. & St. L. R. Co. *v.* Adams (Ind.), 23 Am. & Eng. R. Cas. 408.

UNION PAC. RY. CO.

v.

STERNBERGER.

(*Court of Appeals of Kansas, Northern Department, E. D., Nov. 12, 1898.*)

Death of Employee—Damages*—Evidence—Domestic Conduct.—In an action under section 418 of the Code, it is competent for the plaintiff, as administrator of the deceased, to show the relations existing between the deceased and his family, as bearing upon the question of pecuniary injury suffered by them in his death.

Evidence.—The defendant, without notice to the plaintiff, and shortly prior to the death of the widow of the deceased, took her deposition. *Held*, that this deposition is not a statement against interest, and as such admissible in evidence, under the exception to the rule of law excluding hearsay evidence.

*As to Damages for Death by Wrongful Act, see Walker *v.* McNeill (Wash.), 11 Am. & Eng. R. Cas., N. S., 738 and *notes*, p. 750.

Union Pac. Ry. Co. *v.* Sternberger

Instructions.—It is not reversible error for the court in its instruction, after reciting to the jury the nature of the cause of action and the issues to be determined by the jury, and what it is necessary for the plaintiff to prove thereunder in order to recover, to add: "The grounds of negligence claimed by the plaintiff are more fully set forth in the petition, to which you are referred."

(Syllabus by the Court.)

ERROR by defendant from Douglas county district court. *Affirmed.*

This action was begun by the defendant in error, as administrator of the estate of Charles W. Brown, deceased, against the plaintiff in error, under section 418 of the Code, to recover damages on account of the death of Brown, which it was alleged was occasioned by the wrongful acts or omissions of the plaintiff in error. Brown was a brakeman on the freight train of the plaintiff in error on the 2d day of September, 1887. The train was loaded with coal at Lansing, on the Leavenworth Branch, and was being taken thence to Wamego. The train ran through the switch at the Lawrence junction, and was thereby derailed, the train wrecked, and the engineer, fireman, and the brakeman Brown killed. There was a trial to a jury, which resulted in a verdict for the plaintiff in the sum of $1,500. There had been a former trial, in which the plaintiff recovered $3,000. This judgment was reversed by the supreme court (54 Kan. 410, 38 Pac. 486) because the special findings of the jury were not sustained by the evidence and were inconsistent with each other. The supreme court, in that case, indulged in some comments unfavorable to the verdict to the effect that it was excessive, but did not base the judgment of reversal thereon, saying that it was not necessary to do so by reason of the other errors.

Case Stated.

A. L. Williams, *N. H. Loomis*, and *R. W. Blair* for plaintiff in error.

W. W. Nevison and *John M. Barker*, for defendant in error.

MAHAN, P. J. (after stating the facts). There are 16 assignments of error presented for consideration. The first 13 assignments are based upon the action of the trial court in admitting or excluding evidence. We do not deem it necessary to refer specifically to the first 6 assignments. No

substantial error was committed by the court in its action in the matters referred to therein. All of the testimony objected to had relation to the conduct of the deceased towards his wife and minor son. It was competent for the purpose of showing the relations between the deceased and his family, as bearing upon the question of pecuniary injury suffered by them in the death of the husband and father. The court did not abuse its discretion in any particular therein, nor was the secondary evidence complained of permitted to be introduced without proper foundation.

Death of Employee—Damages—Evidence—Domestic Conduct.

The seventh assignment of error is based upon the exclusion by the court of what is designated as the sworn statement of Mrs. C. W. Brown, the widow, for whose benefit the recovery was sought in the first place, together with her minor son, Charles F. Brown. It is contended that this statement was admissible under the exception to the rule of law excluding hearsay, which admits the statements of deceased persons made against their interest, and which are offered in evidence after the death of the witness. Had the paper been, strictly speaking, such a statement, it would have been competent evidence, and it would have been error to have rejected it, as was decided by the supreme court in the case of Walker *v.* Brantner (Feb. 5, 1898) 52 Pac. 80. The statement was offered as an entirety and excluded as an entirety. Much of it was immaterial, and did not come within the rule contended for in that respect. Some parts of the writing were statements against interest, or might have been called statements against interest had they been made in the ordinary course, but they were not. It was an attempt upon the part of the defendant (plaintiff in error) to introduce the deposition of Mrs. Brown, taken by the defendant without notice to the plaintiff or his counsel. After the suit was begun, and within a day or two prior to the death of Mrs. Brown, counsel for the plaintiff in error, with a detective, a notary public, and a doctor, all in the employ of the defendant, went to her bedside and took her deposition. It is this deposition, so taken without notice, that was sought to be introduced as a voluntary statement of the deceased against her interest. It would seem that this statement would be sufficient, without any further argument in support of the action of the court.

Evidence.

The eighth assignment of error is that the court permitted the deposition of Mrs. Wilson, the mother of Mrs. Brown, to

be read to the jury. The objection was that the deposition was incompetent, and not rebuttal. This contention is without merit.

The ninth, tenth, eleventh, twelfth, and thirteenth assignments of error are similar to the first five,—are based entirely upon technical contentions and are without merit.

The fourteenth contention of counsel is that the court erred in using the following language, in giving its instructions to the jury. After reciting to the jury the nature of the cause of action and the grounds of negligence complained of by the plaintiff, it added: "The grounds of negligence claimed by the plaintiff, are more fully set out in the petition, to which you are referred." The contention is that it was the duty of the court to construe the pleadings. The court did construe them. The court stated to the jury what the issues were, very clearly and concisely, and what it was necessary for the jury to find in order that the plaintiff might recover. This reference to the petition, under the circumstances, could not have affected the rights of the defendant prejudicially.

Instructions.

The fifteenth assignment of error is that the court gave the following instruction: "And it is charged that by reason of the alleged failure and neglect above referred to, and by and through the carelessness, unskillfulness, and improper conduct and default of the servants and employees of the company, the train on which deceased was working was run through an open switch, and wrecked, and that he thereby lost his life." The contention is that there was no allegation in the petition of negligence upon the part of the other servants and employees of the company; that the court did not confine the plaintiff to the specific allegations of negligence as ground for damages alleged in the petition; and cite in support of their contention Telle *v.* Railway Co., 50 Kan. 455, 31 Pac. 1076. In this contention counsel are mistaken. There is a specific allegation of negligence upon the part of the fellow servants and fellow employees of the deceased. This petition was so construed by the supreme court. There was evidence offered, without objection, in support of this allegation, and the evidence sustains the verdict of the jury.

The sixteenth assignment of error is that the court overruled the motion of the plaintiff in error for a new trial. Nothing has been pointed out constituting such error as would warrant the court in sustaining the motion.

There was no evidence to sustain the contention that Brown

was guilty of contributory negligence. It was his first trip over the line. He had no means of knowing that the train was approaching the junction. The landmarks were nothing to him, not knowing that they were landmarks.

The case was fairly submitted to the jury. The verdict and the findings indicate that the jury gave careful attention to the evidence and to the instructions of the court. The judgment is affirmed.

HUNDLEY

v.

LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, Dec. 13, 1898.*)

Master and Servant—Discharge of Employee—Discharge Lists.*—A railroad company has a right to discharge an employee, unless to do so would be in violation of its contractual relations with the employee, and to keep a record of the causes for which it discharged an employee.

Same—Same—Same—Liability of Master.*—If it is the custom of the railroad companies of the country to keep records of the causes of the discharges of their employees, and if by an arrangement among them an employee discharged by one of them for certain causes will not be employed by any other company, a company recording the discharge of its employee will not be liable unless the entry is false and communicated directly or indirectly to another company, and the employee is refused employment because of such entry.

APPEAL by plaintiff from Marion county circuit court. *Affirmed.*

H. P. Cooper, for appellant.

Edward W. Hines, *H. W. Bruce*, *W. C. McChord* and *Leslie & McChord*, for appellee.

PAYNTER, J. It is averred in the petition as amended that the plaintiff has no trade or calling except railroading;

*See notes at end of case.

that for the past five years he has been in the employment of the defendant; that while engaged in the discharge of his duties he was wrongfully, unlawfully, and maliciously discharged by it; that it wrongfully, unlawfully, and maliciously, blacklisted him; that he was blacklisted wrongfully, unlawfully, maliciously, and falsely by its placing upon its records a pretended cause of discharge, to wit, neglect of duty, with a view of injuring and preventing him from entering its employment or that of other railroad companies; that it had entered into a conspiracy and combination with other railroad companies by which its employees discharged for cause will not be given employment by other railroad companies; that, on account of its false and malicious acts and its conspiracy with other railroad companies, he has been deprived of the right to again engage in the employment of the defendant or other railroad companies; that the wrongful acts mentioned were committed for the purpose of making, and had made, it impossible for him to ever again get employment from the defendant on any of its lines, or from other railroad companies in the United States; and that he has been damaged thereby in the sum of $5,000.

Case Stated.

Our attention has not been invited to, nor have we been able to find, any reported case involving exactly the same question as is involved in this case. It is a novel question in this court, although there are reported cases of other courts the doctrine of which might be applied to this case. As the population of the country increases, as the business and commercial industries multiply, as inventive genius causes the civilized peoples of the world to marvel at its discoveries and productions, as space is annihilated by the means of rapid transit for man, commerce, thought, and sound, thus facilitating the conduct of the business, the pursuit of occupations and callings, and the promotion of the social and political intercourse of the world, courts are called upon to apply familiar principles to new questions; if none seem to be applicable, to enunciate a just rule, suited to the state of facts before it and for future application to similar facts. It can never be said that the novelty of a complaint is an objection to the action, if it is made to appear that an injury has been inflicted of which the law is cognizable. The familiar maxim of the law, "*Ubi jus, ibi remedium*," is considered valuable by all courts. It was this maxim which caused the invention of the form of action

called an "action on the case." It is the part of every man's civil rights to enter into any lawful business and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice, or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty, and property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation, or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. One who has followed a certain trade or calling for years may be almost unfitted for any other business. To deprive him of his trade or calling is to condemn, not only him, but perchance a wife and children, to penury and want. Public interests, humanity, and all individual rights, alike, demand the redress of a wrong which is followed by such lamentable consequences. A railroad company has the right to engage in its service whomsoever it pleases, and, as part of its right to conduct its business, is the right to discharge any one from its service, unless to do so would be in violation of contractual relations with the employee. It is the duty of a railroad company to keep in its service persons who are capable of discharging their important duties in a careful and skillful manner. The public interest, as well as the vast property interests of the company, require that none other should be employed by it. Its duty in this regard and its right to discharge an employee does not imply the right to be guilty of a violent or malicious act, which results in the injury of the discharged employee's calling. The company has the right to keep a record of the causes for which it discharges an employee, but in the exercise of this right the duty is imposed to make a truthful statement of the cause of the discharge. If, by an arrangement among the

Master and Servant—Discharge of Employee—Discharge Lists.

railroad companies of the country, a record is to be kept by them of the causes of the discharge of their employees, and when they are discharged for certain causes the others will not employ them, it becomes important that the record kept should contain a true statement of the cause of an employee's discharge. A false entry on the record may utterly destroy and prevent him from making a livelihood at his chosen business. Such false entry must be regarded as intended to injure the discharged employee; therefore a malicious act. If it is the custom of the railroads of the country to keep such record, and that employees discharged for certain causes are not to be employed by them, then it enters into and forms part of, every contract of employment that neither a false entry shall be made, nor one so made communicated, directly or indirectly, to any other railroad company. Suppose it was the custom of the railroads, when an employee was discharged without cause, to give him a card or statement to that effect, and if he did not have such card or statement he could not get employment with other railroad companies, then that custom would enter into every contract of employment; and if a company wrongfully refused to give it to the discharged employee, and in consequence of which refusal he was injured, a cause of action would lie for the damages sustained. For such breach of duty the employee could maintain an action *ex contractu* or *ex delicto*, at his option. 1 Add. Torts, 17 says: "A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought, at the option of the plaintiff." It was one of the purposes of the common law to protect every person against the wrongful acts of every other person, and it did not matter whether they were committed by one person or by a combination of persons, and under it an action was maintainable for injuries done by disturbing a person in the enjoyment of any right or privilege which he had. It is said in Cooley, Torts, 278: "Thus, if one is prevented, by the wrongful act of a third party, from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequences of the wrongful act." It is said in 1 Add. Torts, 14: "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an

action lies in all cases." The plaintiff does not seek to recover because he was discharged in violation of a contract which he had with defendant. He does not allege that he had a contract with it to perform services for it for a given length of time. He seeks to recover damages for its alleged wrongful act in making the false entry upon its record against him, to prevent him from pursuing his calling by rendering it impossible for him to get employment from other railroad companies.

The petition does not state a cause of action against the defendant. The averments that he had been deprived of the "right" to again engage in the employment of other railroad companies, and that the alleged wrongful act had made it impossible for him to ever again get employment with other railroad companies, are mere conclusions of the pleader from the facts alleged. It should have been averred that he had sought, and been refused employment by reason of the alleged wrongful act. An agreement made with other railroad companies not to employ defendant's discharged employees does not injure the plaintiff unless carried out. An averment that the defendant conspired and combined with other railroad companies to do an act, if unlawful, would not obviate the necessity of making the averment that he had sought and been refused employment by reason of the alleged wrongful act. Injury is the gist of the action. The liability is damages for doing, not for conspiracy. The charge of conspiracy does not change the nature of the act. In an action for damages, there must be some overt act, consequent upon the agreement to do a wrong, to give the plaintiff a standing in a court of law. Jag. Torts, 638; Cooley, Torts, 279. For the reasons given judgment sustaining a demurrer to the petition is affirmed.

Same—Same—Liability of Master.

NOTES.

Discharge Lists—Publication for Use by Officers of Company—Privileged Communication. — A discharge list prepared in good faith by the officers of a railroad company upon the report of those having the employment and control of its servants, and distributed amongst its officers for the purpose of preventing the employment of careless or incompetent hands, is a privileged communication. Hunt *v.* Great Northern R. Co. (L. R. 1891), 48 Am. & Eng. R. Cas. 113, 2 Q. B. 189; Missouri Pac. R. Co. *v.* Richmond (Tex.), 38 Am. &

Notes

Eng. R. Cas. 241. But care must be taken to restrict the communication to the proper persons, and to prevent undue publicity. Bacon *v.* Mich. Cent. R. Co., 66 Mich. 166, 31 Am. & Eng. R. Cas. 357; Montgomery *v.* Knox (Fla.), 3 So. Rep. 211; Tench *v.* Great Western R. Co., 32 U. C., Q. B. 452.

Prima Facie Privileged.—Plaintiff was a bridge carpenter in defendant's employ. While on one of defendant's trains, he took by mistake a coat which did not belong to him, leaving his own. For this offense he was discharged and his name put upon the list of discharged employees, which it was customary to make out and send to each agent of the company authorized to employ men, the cause for his discharge being stated in such communication to be for stealing. Plaintiff therefore brought an action of libel against the railroad company. At the trial plaintiff was nonsuited on the ground that the communication was privileged. *Held*, that it was error to take the case from the jury, that although the communication was *prima facie* privileged, yet the evidence in the case should have been submitted to the jury to determine whether defendant, through its agents, acted in good faith under all the circumstances of the case, there being some evidence tending to show that the agents of the defendant were acting through spite or resentment. Bacon *v.* Michigan Central R. Co. (Mich.), 31 Am. & Eng. R. Cas. 357.

Libel.—Where a corporation, by its superintendent, prepares and sends a "discharge-list," assigning a criminal act as a reason for the discharge of an employee, to its agents, and it reaches its destination and is read by such agents, this is a sufficient publication to support an action for libel. The question whether such a communication should be considered as privileged, not being raised in the trial court, is not determined. Bacon *v.* Michigan Central R. Co. (Mich.), 20 Am. & Eng. R. Cas. 633.

Distribution among Other Companies.—A list of discharged employees prepared by a railroad company and distributed among the officers of other corporations having the employment of railroad hands for the purpose of preventing the employment of careless or incompetent servants, is privileged, and, in the absence of evidence showing express malice, a person whose name appears therein has no right of action. Missouri Pacific R. Co. *v.* Richmond (Tex.), 38 Am. & Eng. R. Cas. 241.

In Missouri Pac. R. Co. *v.* Richmond (Tex.), 11 S. W. Rep. 555, it was alleged by the employee that the pamphlet had been sent to the officers of other roads, and for that reason he had been unable to obtain employment. Although this was not proved, the court give their views as to the law if such had been the case. They say: "If,

as alleged in the petition, the pamphlet containing the language complained of was by appellant placed in the hands of those charged with the duty of employing conductors on the different lines of railway throughout the country, it seems to us that the effect of this would be to prevent his obtaining employment in that business for which he alleges he had fitted himself by many years' service, and if the charge was untrue, and published with actual malice as alleged, it was libellous. . . . If, as claimed by appellee, the publication had been placed in the hands of the agents of other railway companies without malice, but for the sole purpose of enabling such agents to avoid the employment of unsuitable persons, whether so communicated by request or not, looking to the public interests involved, we do not see that such a publication would be actionable. It seems to us that any person who, upon reasonable grounds, believes himself to be possessed of knowledge, which, if true, does or may affect the rights and interests of another, has the right, in good faith, to communicate such belief to that other, and he may make the communication with or without request, and whether he has or has not personally any interest in the subject-matter of the communication.

Blacklisting—Misdemeanor.—It has been made a misdemeanor in several states for employers to combine and, by means of blacklisting, prevent the employees discharged by one of them from obtaining employment from the other members of the combination. See Iowa Laws of 1892, c. 47, p. 72; Maine Laws 1891 and 1892, c. 622, p. 976; Mont. Laws 1891, p. 257; Ga. Acts 1890 and 1891, p. 183.

St. Louis, I. M. & S. Ry. Co.

v.

Paul.

(*Supreme Court of the United States, March 6, 1899.*)

Discharged Employees—Wages—Constitutionality of Statute.—The statute of Arkansas (Acts Ark. 1889, p. 76) providing that railroad employees discharged with or without cause shall be entitled to their unpaid wages earned at the contract rate at the time of the discharge without discount on account of the payment thereof before the time they were payable according to the terms of

the contract of employment, is not, as to railroads incorporated under the laws of the state, in violation of any provision of the federal or state constitution, even as to such railroads organized prior to its passage, the power to amend their charters having been reserved under the state constitution.

ERROR by defendant to the Supreme Court of the State of Arkansas. *Affirmed.*

This action was commenced in a justice's court in Saline township, Saline county, Ark., by Charles Paul against the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the state of Arkansas, and owning and operating a railroad within that state, to recover $21.80 due him as a laborer, and a penalty of $1.25 per day for failure to pay him what was due him when he was discharged. The case was carried by appeal to the circuit court of Saline county, and there tried *de novo*. Defendant demurred to so much of the complaint as sought to recover the penalty, on the ground that the act of the general assembly of Arkansas entitled "An act to provide for the protection of servants and employees of railroads," approved March 25, 1889 (Acts Ark. 1889, p. 76), which provided therefor, was in violation of articles 5 and 14 of the amendments to the constitution of the United States, and also in violation of the constitution of the state of Arkansas. The demurrer was overruled, and defendant answered, setting up certain matters not material here, and reiterating in its third paragraph the objection that the act was unconstitutional and void. To this paragraph plaintiff demurred, and the demurrer was sustained. The case was then heard by the court, the parties having waived a trial by jury, and the court found that the plaintiff was entitled to recover the sum claimed and the penalty at the rate of daily wages from the date of the discharge until the date of the commencement of the suit, and entered judgment accordingly. Defendant appealed to the supreme court of the state of Arkansas, which affirmed the judgment (64 Ark. 83, 40 S. W. 705), and this writ of error was then brought.

The act in question is as follows:

"Section 1. Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge, with or without

cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid: provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"Sec. 2. That no such servant or employee who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"Sec. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.

"Sec. 4. That this act shall take effect and be in force from and after its passage."

John F. Dillon, *Winslow F. Pierce*, and *D. D. Duncan*, for plaintiff in error.

A. H. Garland and *R. C. Garland*, for defendant in error.

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

Plaintiff in error was a corporation duly organized under the laws of Arkansas and engaged in operating a railroad in that state.

The state constitution provided: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." Article 12, § 6. This constitution was adopted in 1874, but, prior to that, the constitution

of 1868 had declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; and all such laws may, from time to time, be altered or repealed." Article 5, § 48.

In Leep *v.* Railway Co., 58 Ark. 407, 25 S. W. 75, section 1 of the act of March 25, 1889, was considered by the supreme court of Arkansas, and was held unconstitutional so far as affecting natural persons, but sustained in respect of corporations, as a valid exercise of the right reserved by the constitution "to alter, revoke, or annul any charter of incorporation."

The court conceded that the legislature could not, under the power to amend, take from corporations the right to contract, but adjudged that it could regulate that right by amendment when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.

As the constitution expressly provided that the power to amend might be exercised whenever, in the opinion of the legislature, the charter might "be injurious to the citizens," and as railroad corporations were organized for a public purpose, their roads were public highways, and they were common carriers, it was held that, whenever their charters became obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended, and, as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to secure that result. And the court said: "If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." But the court added that it did not follow

that the legislature could, by amendment, fix or limit the compensation of employees and particularly not as the right to amend was to be exercised so "that no injustice shall be done to the corporators"; that, however, this act was not obnoxious to that objection, as it left "to the corporations the right of making contracts with their employees on advantageous terms."

In respect of the provision that the unpaid wages then earned at the contract rate were to become due and payable on the cessation of the employment, "without abatement or deduction," the court held that that did not "require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby"; but that it meant "that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment."

Construing the statute thus, and, by elimination, confining it to the corporations described, its validity was sustained as within the reserved power of amendment, and the case was approved and followed in that before us.

The scope of the power to amend, and the general subject of the lawfulness of limitations on the right to contract, were considered at length, with full citation of authority, in both these decisions.

The contention is that, as to railroad corporations organized prior to its passage, the act was void, because in violation of the fourteenth amendment. Corporations are the creations of the state, endowed with such faculties as the state bestows, and subject to such conditions as the state imposes, and, if the power to modify their charters is reserved, that reservation is a part of the contract, and no change, within the legitimate exercise of the power, can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied. Railway Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. 1161.

The question, then, is whether the amendment should have been held unauthorized, because amounting to a deprivation of property forbidden by the federal constitution.

The power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made" (WAITE, C. J., Sinking Fund Cases, 99 U. S. 700); but any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights" (GRAY, J., Inland Fisheries Com'rs *v.* Holyoke Water-Power Co., 104 Mass. 446, 451; Greenwood *v.* Freight Co., 105 U. S. 13; Waterworks *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. 48).

This act was purely prospective in its operation. It did not interfere with vested rights or existing contracts or destroy, or sensibly encroach upon, the right to contract, although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named.

In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the supreme court held the regulation as promoting the public interest in the protection of employees to the limited extent stated, to be properly within the power to amend reserved under the state constitution.

Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion, in its application to the power to amend, can be disputed on the ground of infraction of the fourteenth amendment. Insurance Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. 281; Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383; Railway Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. 243.

Railway Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255, is not to the contrary, and was properly distinguished from this case by the supreme court of Arkansas. There a state statute provided for the assessment of an attorney's fee of not exceeding $10 against railroad companies for failure to pay certain debts, and the exaction was held to be a penalty, although no specific duty was imposed for the nonperformance of which it was inflicted. This court said: "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties,—duties

which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state." The conclusion was that the subjection of railroad companies only to the penalty was purely arbitrary, not justifiable on any reasonable theory of classification, and that the statute denied the equal protection of the law demanded by the fourteenth amendment. In this case the act was passed "for the protection of servants and employees of railroads," and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid.

Judgment affirmed.

JOHNSON

v.

CHARLESTON & S. RY. CO.

(*Supreme Court of South Carolina, Jan. 16, 1899.*)

Relief Fund—Acceptance of Benefits—Releasing Master from Liability—Estoppel.— The defendant railroad company was one of several companies constituting what was called the "Plant System," in which there was an organization established for the purpose of raising a fund for the payment of specified amounts to any employee contributing to the fund, when he became disabled. It was alledged that plaintiff in becoming a member of such organization agreed, in consideration of the companies' contributions to the fund, and of the guaranty by them of the payments of such benefits, that the acceptance of the benefits should release the companies, and each of them, from all claims for damages accruing to plaintiff by reason of any injury that he might sustain. *Held*, that the acceptance of such benefits and the execution of a written agreement purporting to release defendant, because of such benefits, from all liability on account of injuries sustained by plaintiff while in defendant's employ, through its negligence, would not have es-

topped plaintiff from maintaining an action for such injuries, as the alleged agreement would have been void, and not susceptible of ratification. *By a divided court.*

Contract Exempting Master from Liability—Constitutional Law.—Section 15 of article 9 of the constitution of South Carolina is not applicable to a contract between a railroad company and its employee exempting the former from liability for injuries to the employee resulting from the negligence of the company. *By a divided court.*

Same—Public Policy—Decision of Trial Court.—The trial court did not decide that such an agreement as the one plaintiff was alleged to have entered into in becoming a member of such organization would be null and void as against public policy. *By a divided court.*

Same—Same.—Such an agreement is not void as against public policy, even though the employee entering into it was required by the rules of his employer to become a member of the organization, as under such agreement the employee, after sustaining an injury, is at liberty to reject the benefits, and bring an action. *By a divided court.*

Same—Validity of Release.*—A formal agreement releasing a railroad company from liability for injuries to an employee sustained through the negligence of the company, signed by the employee in consideration of the receipt of benefits from a relief fund under such a contract, is valid and binding upon the employee. *By a divided court.*

APPEAL by plaintiff from Charleston county circuit court of common pleas. *Affirmed by a divided court.*

W. St. Julien Jervey, for appellant.
Mordecai & Gadsden, for respondent.

Case Stated.

POPE, J. This action for damages came on for trial before his honor JUDGE R. C. WATTS. The hearing was confined to an oral demurrer to the second affirmative defense set up in the answer, which demurrer was overruled, and from the order of JUDGE WATTS overruling the same an appeal is now presented to this court. It will be proper, therefore, to reproduce the pleadings, to the end that our ruling may be properly understood.

Complaint (caption omitted): "The complaint of Willis Johnson against the Charleston & Savannah Railway Company, defendant herein respectfully showeth: (1) That the

*See Maine *v.* Chicago, B. & Q. R. Co. (Iowa), 9 Am. & Eng. R. Cas., N. S., 299, and *note*, 307.

defendant was, at the time hereinafter mentioned, and now is, a corporation duly created and existing under the laws of the state aforesaid. (2) That the plaintiff was, on or about the 16th day of November, in the year of our Lord one thousand eight hundred and ninety-six, in the employ of the defendant company as a fireman, and was there actively engaged at work on a train of said defendant company, running between Charleston and Savannah. (3) That while so engaged, at Ridgeland, in the county of Beaufort and state aforesaid, as fireman on train proceeding from Savannah to Charleston, under charge and control of Robert Smart,engineer, it became the plaintiff's duty to stand upon a certain platform, on which wood was piled, and from said platform to load the tender with fuel, by throwing sticks of wood therein. That, after supplying the tender with wood, as aforesaid, on a signal that the engine was about to move the plaintiff stepped to the edge of the said platform, and thence endeavored to step onto the engine. (4) That, by reason of the broken and unsound condition of the said platform which caused the fall of the plaintiff, and the sills on which it rested, the said platform gave way under the weight of the plaintiff, and forcibly precipitated him upon the iron structure of the engine. (5) That the broken and unsound condition of the said platform which caused the fall of the plaintiff, as aforesaid, was the result of the carelessness and negligence of the defendant in not keeping said platform in good, reasonable,and safe repair. (6) That, by reason of the fall aforesaid, the plaintiff sustained serious wounds and bruises in his arm, side,and leg, and also injuries of an internal nature, causing him severe bodily pain and suffering, so that he is not able to perform his accustomed labor. That he has already expended a considerable amount of money for medicines and medical attendance, and is advised by his physicians that his said injuries will probably disable him permanently from performing such labor as he was heretofore capable of performing, and will continue to cause him pain and require medical attention and medicine for the rest of his life. (7) That, by reason of the carelessness and negligence of the defendant, as hereinbefore set forth, the plaintiff has been damaged ten thousand dollars. Wherefore the plaintiff demands judgmemt against the defendant for the sum of ten thousand dollars, and for the costs and disbursements of this action. Complaint verified. W. St. Julien Jervey, Plaintiff's Attorney."

Answer: "The defendant, the Charleston & Savannah

Railway Company, answering the complaint herein, says: (1) This defendant admits the allegations contained in the first paragraph of said complain. (2) This defendant denies the allegations contained in the second, third, fourth, fifth, sixth, and seventh paragraphs of said complaint. And, by way of affirmative defense to said action, this defendant says: That the injury alleged in said complaint to have been received by the plaintiff, Willis Johnson, was caused by the contributory negligence of the said plaintiff, in not exercising due care and caution in stepping on said engine from said platform, and that but for said want of care said injury would not have happened, such contributory negligence on the part of the plaintiff being the primary cause of said injury. And, by way of affirmative defense to said action, this defendant alleges: That the said plaintiff, at the time he claims to have received the alleged injury, was a member of the Plant System Relief and Hospital Department. The said Relief and Hospital Department is an organization formed by the Charleston and Savannah Railway, Savannah, Florida and Western Railway, Alabama Midland, Brunswick and Western, Florida Southern, and other railway companies (which said railway companies comprise the Plant System), for the purpose of establishing and managing a fund for the payment of definite amounts to employees contributing to the fund who, under the regulations, are entitled thereto, when they are disabled by accident or sickness, and to their families in the event of death. The said relief fund is formed from contributions from the employees and the Plant System, income derived from investments, and appropriations by the Plant System when necessary to make up a deficit. The regulations governing said Relief and Hospital Department require that those who participate in the benefits of the relief fund must be employees in the service of one of the railroad companies comprising said Plant System. This defendant further says that participation in the benefits of said relief is based upon the application of the beneficiary, and subject to all the rules and regulations of said Relief and Hospital Department. Defendant further says that, on the second day of November, 1896, the plaintiff herein, being in the employ of the defendant company, and said company, being a member of the Plant System, applied for membership in the said Plant System Relief and Hospital Department, and in said application agreed to be bound by all the regulations of the Relief and

Hospital Department, and in said application further agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, the acceptance of the benefits from the said Relief and Hospital Department for injury or death should operate as a release of all claims against said companies and each of them for damages by reason of such injury or death. Defendant further says that, when the plaintiff received the alleged injury, he thereupon became entitled to the benefits coming out of his membership in said Relief and Hospital Department, by reason of the injury alleged to have been received by him while in said service. That said plaintiff thereupon immediately applied to said department for such benefits, and received therefrom payments amounting in all to the sum of $66.50, being the amount due for 133 days at the rate of 50 cents per day, which was the rate to which the plaintiff was entitled as a member of said Relief and Hospital Department. This defendant further says that, in accordance with the regulations of said Relief and Hospital Department, said plaintiff received free medical and surgical attendance from the surgeons of said company, and care and treatment in the said company's hospitals free of charge, and the said relief and hospital department did all on its part to be done for and in behalf of the said plaintiff, by virtue of his membership in said department. The said sum of money the said plaintiff duly accepted and receipted for, under the regulations of said Relief and Hospital Department, and in accordance therewith, and the said plaintiff, in consideration of the payment to him of the said sums of money, thereupon duly released and forever discharged said defendant company, and each and every company comprising the Plant System, from all claims and demands for damages, indemnity, or other form of compensation he then had, or might or could thereafter have, against any one of the aforesaid companies, by reason of said injury, which said receipts and releases were severally signed and sealed, and delivered to the said relief and hospital department, by the said plaintiff. Wherefore this defendant alleges that the acceptance of the said benefits from said Relief and Hospital Department for said alleged injury, and the execution of the release aforesaid, operate to release and discharge said defendant company from any and all claims for damages arising in any way out of the injury complained of by said plaintiff in his said complaint."

Johnson *v.* Charleston & S. Ry. Co

Oral demurrer (caption omitted): "The plaintiff demurs to the second affirmative defense set up in the answer, and moves that the same be dismissed, for the reason that it does not state facts sufficient to constitute a defense, in this: that in said defense it is alleged that the plaintiff had entered into a contract with the defendant whereby it was agreed, upon certain consideration, that the defendant should be released from all claims of the plaintiff for damages by reason of accidental injury or death; that such contract is contrary to law and against public policy, and a release thereunder cannot, therefore, be pleaded as a defense to an action for damages caused by the defendant's negligence. W. St. Julien Jervey, Plaintiff's Attorney." This demurrer was overruled; and his honor said: "There is no question in my mind that a contract of that kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems, in this case, that the plaintiff had entered into that agreement relieving the railroad company before he was injured. After he was injured, he was put to his election as to whether he would sue the railroad company or go ahead and carry out the contract and receive the benefits of that contract. It seems to me that the decision in the case of Price *v.* Railroad Co. [133 S. C. 556, 12 S. E. 413] would control this case, and I think the plaintiff is now estopped from bringing his action against the railroad company, having elected to receive the benefits under that contract, and from suing the railroad company here for damages, and I overrule the demurrer." Counsel for the plaintiff excepted to the ruling, and gave notice of intention to appeal.

Exceptions: "(1) Because his honor erred in holding that the said second affirmative defense set up in the answer contained allegations of fact sufficient to constitute a defense. (2) Because his honor erred in not holding that a contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void, under the constitution of the state. (3) Because his honor erred in not holding that such a contract is null and void, because it is against public policy. (4) Because his honor erred in holding that such a contract may properly be pleaded as a defense in an action brought by an employee against a railroad company for damages caused by said

company or its servants. (5) Because his honor erred in holding that, even if such a contract were void, the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar recovery of damages."

It is apparent from the text of JUDGE WATTS' decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void, as against public policy; and from this decision of JUDGE WATTS there is no appeal, and hence it is the law of this case. However, the circuit judge, as he thought, under the decision of this court in the case of Price *v.* Railroad Co., 33 S. C. 556, 12 S. E. 413, held that the subsequent receipt of Johnson to the defendant company would estop Johnson from bringing this action. We fear the case of Price *v.* Railroad Co., *supra*, has been given a force that it was not intended to possess. In the case cited, Price, while an employee of the railroad company, was injured, in February, 1887, by the alleged negligence of the railroad company, and, on the 5th day of August of the same year (1887), executed a release to said company, for a valuable consideration, whereby he discharged such company from any claim, demand, or liability for payment of any other or further sum or sums of money, for or on account of his injury while in their service. Price died on the——day of November, 1887. His wife, as the administratrix of his estate, brought an action against the railway company for damages, under what is known as the "Lord Campbell Act." On trial, the defendant railway company offered to prove, under the plea in its answer, that Price, the intestate, had in his lifetime released any right of action, for a valuable consideration, for his injury by the railway company. The circuit judge denied the proof, whereupon the railroad company appealed to this court, and it was here decided that the circuit judge was in error, because the right of action under LORD CAMPBELL'S act (sections 2183 to 2186 of General Statutes) was first in the party injured, which right of action survived his death to his administrator, and that, as Price was competent to deal with his right of action in his lifetime, and had settled with the railroad company, therefore such settlement would estop his administratrix, unless the receipt was executed under fraud or duress. There was no allegation there that the contract not to sue was against a sound public policy, or that the receipt Price executed was, in accordance

with and as a part of such illegal contract. So that we do not think the case of Price *v.* Railroad Co. is decisive of this case. We have never had a case in our courts before, where this question was considered. There have been such in other courts of this country, where the decisions have been different,—some upholding the receipt, and indeed the contract, as binding; as, for example, in the state of Pennsylvania, in the cases of Johnson *v.* Railroad Co., 29 Atl. 854; Graft *v.* Railroad Co., 8 Atl. 206; also, in the state of Maryland, see Fuller *v.* Association, 10 Atl. 237; Spitze *v.* Railroad Co., 23 Atl. 307; also, in the state of Iowa, see Donald *v.* Railway Co., 61 N. W. 971; also, state of Nebraska, see Railroad Co. *v.* Bell, 62 N. W. 314; also, in the state of Ohio, see Railway Co. *v.* Cox, 45 N. E. 641; Owens *v.* Railroad Co., 35 Fed. 715; also, in Illinois, Eckman *v.* Railroad Co., 48 N. E. 496; also, the state of West Virginia. The only case where the court has refused to sustain the question is that of Miller *v.* Railway Co., 65 Fed. 304; *Id.*, 22 C. C. A. 264, 76 Fed. 441. It seems to us that, when analyzed, the proposition of the defendant railway company is, as to either or both of these matters: First, a party can contract to relieve a railway company from the negligence of such railway company; or, second, a party, not being able to contract with a railway company as against its negligence, yet, by the acceptance of a benefit under such contract, may be estopped thereby from suing the railway company for its negligence. As to the first position, we say unhesitatingly that our decisions uniformly hold that we cannot make a valid contract to free a railway company from negligence. Swindler *v.* Hilliard, 2 Rich. Law, 286; Baker *v.* Brinson, 9 Rich. Law, 202; Wallingford *v.* Railroad Co., 26 S. C. 258, 2 S. E. 19. But, apart from our decisions, the new constitution of this state, adopted in the year 1895, in article 9, § 15, provides: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars or even engaged about a different piece of work. * *

Any contract or agreement expressed or implied, made by any employee to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employee or a corporation or his legal or personal representative, of any remedy or right that he now has by the law of the land." (Italics ours.) One of the results of this provision of the constitution is that the employees of a railway corporation are placed upon the same plane with all other persons in any case of injury which results from negligence of such railway company. This being so, no contract by which an employee binds himself to forego an action by reason of negligence as against a railway company is valid. It is not only against public policy, but it is forbidden by the constitution. Now, as to the second point: It seems to us that the language in the last part of section 15, art. 9, of our constitution forbids any agreement by an employee to waive the benefits of this section. But, if this were not so, still, as the original contract to release the railway from the liability for its negligence was void, any attempt by this employee to ratify such void contract is a nullity. It is needless to prolong this discussion or to cite the numerous authorities bearing on this matter. 28 Am. & Eng. Enc. Law, 478, puts the doctrine thus: "A void act, as defined in the later cases, and by approved authorities, is one which is entirely null, not binding on either party, and not susceptible of *ratification*." (Italics ours.) We will not undertake to comment upon the plans of the Plant System as to the protective association. It has some admissible points, but is fatally defective in others. My opinion is that the judgment of this court should be that the judgment of the circuit court be reversed; but, inasmuch as the justices are evenly divided in opinion, under our constitution the judgment of the circuit court stands affirmed.

Relief Fund—Acceptance of Benefits—Releasing Master from Liability—Estoppel.

JONES, J., dissenting.

GARY, A. J. I concur in the conclusion announced in the opinion of MR. JUSTICE POPE, as it seems to me the allegation of the second or affirmative defense show a scheme on the part of the defendant to avoid its liability for negligence, and that it is therefore against public policy, null, and void. The unlawful scheme even extended to the acceptance of the benefits thereunder, and such acceptance is also against public policy.

McIVER, C. J. Being unable to concur in the conclusion reached by Mr. JUSTICE POPE, I purpose to state the grounds of my dissent. All the material facts are so fully set forth in the leading opinion that it will be unnecessary to repeat them here in detail. The sole question presented for the decision of the circuit judge was whether the demurrer to the second affirmative defense, based upon the ground that the facts stated therein were not sufficient to constitute a defense, should be sustained; and, he having held that the demurrer could not be sustained, the question presented for the decision of this court is whether such ruling was erroneous in one or more of the several particulars pointed out by the exceptions. The first exception is manifestly too general to require further notice, under the well-settled practice. The third and fourth exceptions are taken under a misconception of the ruling of the circuit judge; for, so far from not holding that a contract whereby a railroad corporation "seeks immunity from damages caused by the negligence of itself or its servants" is null and void because against public policy, he expressly so held, and, so far from holding that "such a contract could be pleaded as a defense to an action brought by an employee against a railroad company for injuries caused by [the negligence of] the said company or its servants" (the words which I have inserted in brackets being obviously inadvertently omitted), he, in terms, so held. This is manifest from the language used in the first sentence of the remarks made by the circuit judge in overruling the demurrer. These two exceptions may therefore be dismissed from further consideration. So, also, the fifth exception does not exactly represent the ruling of the circuit judge; but, by a liberal construction (which I am disposed to give it), this exception may be regarded as sufficient to raise the question whether there was error in ruling that, after the injury was sustained, the plaintiff was put to his election whether he would sue the company for damages, or accept the benefits of the arrangement set forth in the second affirmative defense, and, these having been accepted by the plaintiff, he was estopped from suing the company, and I am quite willing so to consider that exception. So that, according to a strict practice, the only question necessary for this court to consider is whether the second and fifth exceptions can be sustained.

The second exception presents the question whether there is any provision in the present constitution declaring that "a

Contract Exempting Master from Liability—Constitutional Law.

contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void." Waiving the objection, which might be raised, that there is nothing in the record showing that such question was presented to or considered by the circuit judge, as I prefer to consider the question on its merits, disembarrassed by any technical objection or rule of practice, I propose to so consider it. The only provision which is relied upon is that contained in section 15 of article 9 of the present constitution, which reads as follows: "Every employee of any railroad corporation shall have the same rights and remedies for any injuries suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition or any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines, voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The general assembly may extend the remedies herein provided for, to any other class of employees." It seems to me very obvious that the main purpose of this provision of the constitution was to make material, and, as I think, wise and proper, changes in the long-established rule whereby an employer, when sued for damages for injuries sustained by one of his employees, could exempt himself from liability by showing that the injuries complained of by the employee re-

sulted from the negligence of one of his fellow servants, and to settle finally the doctrine (as to which there had been some conflict of authority) that the fact that an employee (except a conductor or engineer in charge of dangerous or unsafe cars or engines voluntarily operated by him) knew that the machinery or other appliance by which he was injured was defective or unsafe would constitute no defense to an action for damages brought by such employee, and finally to declare that any contract or agreement, either express or implied, by which any employee undertakes to waive the benefits of this section, shall be null and void. Now, what are the benefits secured by this section to the employee of a railroad corporation? (1) Putting the employee on the same footing as other persons, not employees, so far as his rights and remedies for injuries sustained under the circumstances mentioned in the section are concerned. (2) Declaring that the fact that the employee knew of the defective or unsafe condition of the machinery or other appliances which caused the injury should constitute no defense to an action for damages sustained by such injury. (3) Giving to the representatives of any employee killed on the railroad the same rights and remedies as the representatives of any other person, not an employee, who may be killed by the railroad company, would have. (4) Declaring any contract to waive the benefits of this section to be null and void. (5) Declaring that this section shall not be so construed as to deprive any employee of a corporation of any right that he now has by the law of the land. (6) Authorizing the general assembly to extend the remedies therein provided for to any other class of employees. From this analysis of the provisions of the section, it seems to me very clear that it has no application whatever to this case. The affirmative defense here set up is not based upon any contract or agreement to waive any of the benefits secured by the section of the constitution above analyzed. The constitutional provision now under consideration does not even purport to declare that a railroad corporation cannot, by contract, exempt itself from liabilities for damages sustained by reason of its own negligence or that of its servants or agents, for the very obvious reason that such a declaration would have been wholly unnecessary, as that was the law at the time of the adoption of the constitution, well settled by authority, and fully sustained by sound reason, and undisputed by any one. The sole object of the constitutional provision was to confer upon the employees

of railroad corporations certain benefits therein specifically stated, which they either had not previously enjoyed, or their right to which was a matter of question; and, to secure to such employees the full enjoyments of such benefits, it was further provided that any contract to waive any of such benefits "shall be null and void." I am therefore unable to perceive that section 15 of article 9 of the present constitution has any application to this case, and hence I think the second exception should be overruled.

Same—Public Policy—Decision of Trial Court.

Proceeding, then, to the consideration of the fifth exception: This exception, as it seems to me, is based upon the assumption that the contract or arrangement set out in the second affirmative defense is void because against public policy. Whether this assumption is well founded is an important and interesting inquiry, of novel impression in this state, at least. But, before proceeding to this inquiry, I desire to notice a mistake into which, I submit with deference, MR. JUSTICE POPE has fallen. He says (and in justice to him I quote his language): "It is apparent from the text of JUDGE WATTS' decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void as a against public policy; and from this decision of JUDGE WATTS there is no appeal, and hence it is the law of this case." In the first place, it is at least doubtful whether the circuit judge so construed the contract set up in the affirmative defense. His language, following immediately after the statement of the grounds of the demurrer, should be construed in connection with that statement: "He says there is no question in my mind that a contract of that kind [meaning a contract of the kind mentioned in such statement], whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company." But he nowhere says that he regarded the contract set up in the affirmative defense as void. It is true that he does say, immediately after the language just quoted, that "it seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured"; and he then proceeds to hold that after the plaintiff was injured he was put to his election whether he would sue the company, or carry out the contract by receiving the benefits thereof, and

that, having elected to receive the benefits of the contract, he was estopped from suing for damages. His idea seems to have been that, even if the contract was void, the plaintiff, by receiving its benefits, had estopped himself from suing. This, judging from the language used in the exception, seems to have been the view taken by appellant's counsel, for the error imputed to the circuit judge by the fifth exception is "in holding that 'even if such a contract were void the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar the recovery of damages.' "

But, in the second place, even if it be assumed that the circuit judge did consider the contract or arrangements set out in the affirmative defense void as against public policy, and gave as his reason for the judgment which he pronounced, that, notwithstanding such contract was void, yet the plaintiff, by accepting its benefits after the injury was sustained, had estopped himself from bringing this action, I do not think this court would be thereby precluded from considering and determining the two questions: (1) Whether the contract or arrangements set up as a bar to the action was in fact contrary to public policy, and therefore void; (2) if so, whether the acceptance of the benefits of such contract or arrangements after the injury was sustained estopped the plaintiff from bringing this action. As I understand it, the appeal is from the judgment rendered by the circuit court, and not from the reasons given by the circuit judge for such judgment. The question, therefore, is whether any error in the judgment has been pointed out by the exceptions, and not whether the reasons given for such judgment are well founded; for, as has been frequently said, a judgment may be affirmed, though the reasons given for it by the circuit judge may not be sound. If, therefore, the circuit judge can properly be regarded as having considered the contract set up in the affirmative defense as contrary to public policy, and therefore void, the defendant could not appeal from that, as the judgment was in its favor; and, the defendant company having obtained the judgment of the circuit court, it matters little to the company what may have been the grounds upon which such judgment was based. It seems to me, therefore, that this court not only may, but should, consider the important and interesting question whether such contract is contrary to public policy. This question, new in this state, has been considered and deter-

mined in at least eight of our sister states, and by federal courts in at least four of the circuits. In every case which has been brought to my attention, except one, contracts similar to that now under consideration have been upheld, as not contrary to public policy and not void. Even in the case mentioned as an exception (Miller *v.* Railway Co., 65 Fed. 304), it seems that, when the case was carried up by appeal the appellate tribunal, while affirming the judgment, did not do so upon the ground that the contract was contrary to public policy, and therefore void, but upon the ground of defect in the plea setting up the contract as a defense. Indeed, the appellate tribunal seems to have recognized the authority of the numerous cases holding that such contract was not void as against public policy. Many of these cases, having been mentioned in the opinion of Mr. JUSTICE POPE, need not be cited here. While it is quite true that these cases are not binding authority of this court, and are only useful as showing the trend of the judicial mind, and mainly valuable for the strength of the reasoning employed therein, yet, when such unusual and striking unanimity is found in the various courts and various jurisdictions in which this question has been considered, it is well calculated to incite this court, when called upon for the first time to determine this question, to the most careful consideration of the reasoning by which such a practically unanimous result has been reached. I propose, therefore, to consider with care this question, aided largely by the light which has been thrown upon it by the various judges who have been called upon to determine the question.

In the outset, I desire to say (what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point) that I do not suppose any one doubts that a contract whereby a railroad corporation, or any other common carrier, undertakes to secure immunity from liability for damages for injuries resulting from the negligence of the carrier, or any of his servants or agents, is contrary to public policy, and therefore void. But the question here is whether the contract or arrangement set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded; for, on the contrary, the very terms of the contract necessarily assume that the defendant is liable, and the whole scope and effect of the contract are to fix the measure or such liability, and the manner in which such liability shall be satisfied. As is

Same—Same.

well said in one of the cases cited (Johnson *v.* Railroad Co., 163 Pa. St. 127, 29 Atl. 854), "He [referring to the plaintiff] is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." How such a contract can be construed to be a contract whereby the carrier seeks to obtain immunity from liability for damages sustained by reason of its own negligence or that of its servants or agents, it is impossible for me to conceive. Let us examine in detail the terms of the contract or arrangements as set out in the affirmative defense, and see whether such terms do not fully justify what I have said as to its scope and effects. It seems that the defendant company is one of several railroad companies constituting what is called the "Plant System," in which there is an organization called the "Relief and Hospital Department," established for the purpose of raising a fund for the payment of specified amounts to any employee contributing to the fund, when he is disabled by accident or sickness, and to his family in the event of his death. This fund is raised by stated contributions from the employees, from the Plant System, from income that may be derived from investments of the fund, and from appropriations made by the Plant System when necessary to make up a deficit in the fund. It is alleged in the affirmative defense that the plaintiff applied for membership in the said Relief and Hospital Department, and in his application agreed to be bound by all of the regulations of said department, and further agreed that, in consideration of the contributions from the companies composing the Plant System to said fund, and of the guaranty by them of the payments of the benefits aforesaid, the acceptance of such benefits should release the said companies, and each of them, from all claims for damages sustained by reason of any injury that such employee might sustain. It is further alleged that, as soon as the plaintiff sustained the injury complained of in this case, he immediately applied for and obtained from the said Relief and Hospital Department all the benefits to which he was entitled under the regulations of such department, as well in money as in surgical and medical services, care, and treatment in the hospital free of any charge therefor, and that the plaintiff, in consideration therefor, duly executed, under his hand and seal, receipts therefor, and release of all claims for damages or other form of compensation which he might have against the defendant company. From this statement of the nature and terms

of the contract or arrangement in question, which substantially covers the allegations made in the second affirmative defense, to which alone the demurrer was directed, which allegations must, in considering the demurrer, be accepted as true, I do not see how it is possible to regard such contract as a contract exempting the defendant company from liability for damages sustained by reason of the negligence of the defendant company, or that of its servants or agents. By entering into this contract evidenced by his becoming a member of the Relief and Hospital Department, plaintiff did not waive or release any right of action which he might thereafter have against the defendant company, but his contract was that if, after receiving any injury at the hands of the company he accepted the benefits which he would be entitled to claim by virtue of his membership of such department, such acceptance should operate as a release of any right of action which he might otherwise have against the company. So that by the terms of the arrangement the plaintiff, after he sustained the injury, had his election either to accept the benefits which, as a member of the Relief and Hospital Department, he would be entitled to claim, or to decline to receive such benefits. If he accepted, he was then bound to release the company; but, if he declined, he was not bound to release the company, but retained his right of action, just as if he had never become a member of the Relief and Hospital Department. It may be said that this seems to be a one-sided arrangement, as the plaintiff, if he declined to accept the benefits would lose the amount which he had contributed to the Relief and Hospital Department fund. But when it is considered that by the terms of the arrangements the plaintiff would be entitled to the benefits of the fund, and to medical or surgical services,and to care and treatment in the hospital, free of any charges therefor,even if his disability arose from sickness from natural causes,or from injuries for which the railroad company could not be held responsible,this seeming one-sidedness disappears. Furthermore, inasmuch as the plaintiff had the right of election, after the injury was sustained, either to sue for damages,or to claim the benefits of the Relief and Hospital Department, he could, if the injury was slight, accept the benefits of the Relief and Hospital Department as satisfactory compensation for the injury, but if the injury was serious, calling for greater compensation than would be afforded by the benefits which he might claim,

he could exercise his right to sue for damages; so that it seems to me that the arrangement, properly understood, would be favorable, rather than detrimental, to the interests of the employee. But, however this may be, such an arrangement certainly cannot be regarded as a contract whereby the carrier undertook to secure immunity from liability for injuries sustained by his employee, resulting from his own negligence or that of his servants or agents. As was well said in the cases above cited, and referred to with approval in another subsequent case in Pennsylvania (Ringle v. Railroad Co. [Pa. Sup.] 30 Atl. 492): "It is not the signing of the contract [or becoming a member of the Relief and Hospital Department], but the acceptance of benefits after the accident, that constitutes the release of the injured party. Therefore he is not stipulating for the future, but setting up for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. * * * The substantial feature of the contract which distinguished it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefit of the association [department] or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

It was claimed by counsel for appellant, in his argument, that under the rules and regulations of the defendant company the plaintiff was required, when he entered the service of such company, to become a member of the said Relief and Hospital Department; but, as that fact does not appear in the "case" as prepared for argument here, it cannot, under the well-settled rule, be considered. But I may say that, under my view of the case, such fact, even if it did appear, would make no difference. As I understand it, every person who enters the employment of another agrees, either expressly or impliedly, to conform to the regulations of the employer for the control and management of his employees; and, if he is not willing to conform to such regulations, he is at perfect liberty to decline entering the service of such employer. So, here, when the plaintiff entered the service of the defendant company he did so voluntarily, as he was under no compulsion to do so, and might have entered the service of some other company which had no such rules and regulations, or might have engaged in some other employ-

ment, but, when he entered the service of the defendant company, he, like all other employees signified his willingness to conform to its regulations; and he, therefore, cannot properly be said to have been compelled to enter into the contract or arrangements in question.

But even if the contract in question could be regarded as contrary to public policy, and therefore void, then, in the eye of the law, the case stands as if no such contract had ever been executed. If the contract was an absolute nullity, then it is as though no such contract was ever made. If so, then the allegation distinctly made in the second affirmative defense, that the plaintiff, after sustaining the injury complained of, for valuable consideration, under his hand and seal, released the defendant company from all liability for such injury, was certainly sufficient to constitute a defense to the action; and for that reason, if no other, the demurrer was properly overruled. For that would be precisely in accordance with the principle established in the case of Price *v.* Railroad Co., 33 S. C. 556, 12 S. E. 413. It seems to be supposed that the case just cited has been misunderstood, and that it has no application to this case. Let us see. That was a case in which Price, a conductor of a freight train, was seriously injured on the 18th of February, 1887, while in the performance of his duties as such, from the effects of which he died in the month of November following. On the 8th of August, 1887, after the injury was sustained, but before his death, he executed a release, for valuable consideration, of his right of action against the railroad company. Subsequently, to wit, in August, 1888, an action was commenced against the railroad company by the administratrix of Price to recover damages under the statute (Lord Campbell's act). On the trial the defendant company offered to put the release in evidence, as a bar to the action, which was ruled inadmissible. Upon appeal it was held that the release was competent, and that its effect was to bar the plaintiff's right of action, unless it was made to appear that such release was obtained by fraud or duress. It is very clear that the court in that case considered and determined the very question presented here, for in the opinion of the court we find this language: "We think the leading and controlling question in the case is as to the admissibility *and effects* of the release above mentioned." (Italics mine.) And, after showing that the capacity of the deceased to maintain the action is made the test of the right

of the administratrix to maintain the action provided for by statute, the court proceeds to use this language: "It cannot be doubted that if the deceased had not died, and such release had been pleaded and proved in an action instituted by him to recover damages for the injury alleged to have been done him by the wrongful act of the defendant, it would have been a bar to such action, unless it had been made to appear that such release was obtained by fraud or duress."

Same—Validity of Release.

That case therefore certainly does decide that such a release, in the absence of fraud or duress,—of which there is not, and cannot be, any pretense in this case,as now presented,—would bar the plaintiff's right of action. It may be that, as in Price's Case, 38 S. C. 199, 17 S. E. 732, when this case comes to trial upon its merits the plaintiff will be able to show that the release was obtained by fraud or imposition ; but that is a matter which we cannot consider now, when the question is simply as to the sufficiency of the pleading.

It is contended, however, that the release relied on as a bar to the action is but a part of the contract claimed to be void because contrary to public policy, and hence must fall with it. In the first place, as I have endeavored to show, I do not think any part of the contract is contrary to public policy ; but conceding, for the sake of argument, that it is, in the second place I do not think the act of giving the release entered into, or formed any part of, the contract. The terms of the contract, as set out in the second affirmative defense, are that the plaintiff "agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, *the acceptance of the benefits from the said Relief and Hospital Department for injury or death shall operate as a release of all claims against said companies*, and each of them, for damages by reason of such injury or death" (italics mine); and I am unable to discover anything in the contract which contemplates or requires any formal release, such as is alleged to have been executed by the plaintiff. On the contrary, if, as we have seen, by the terms of the contract, the acceptance were to "operate as a release," there would and could be no necessity for the execution of a formal release. Hence, when the plaintiff did, as alleged, execute a formal release, he was not acting in pursuance of the contract, or carrying out any of its terms, but it was his own voluntary act, independent

of the alleged void contract, which must operate as a bar to the action, as declared in Price's Case. Besides, I am not now prepared to assent to the proposition that because one of the terms of a contract is contrary to public policy, and therefore void, it necessarily follows that all the other terms must likewise be declared void. But as it would extend this opinion to an unreasonable length to enter into any discussion of that proposition, and as I do not deem it necessary to do so in this case, under the views which I have taken, I do not propose to discuss that proposition, or to express any definite opinion with reference to it. It seems to me, therefore, that, under any view that may properly be taken of this case, there was no error in the judgment overruling the demurrer, and hence such judgment should be affirmed.

LOUISIANA WESTERN EXTENSION RY. CO. *et al.*

v.

CARSTENS *et al.*

(*Court of Civil Appeals of Texas, June 9, 1898.*)

Death of Employee—Contributory Negligence—Instructions.—In an action for the death of an employee, it was error to refuse to call the attention of the jury to certain alleged contributory negligence, it having been pleaded and there being evidence tending to establish it, and it constituting, if established, a complete defense to certain alleged negligence on the part of defendant.

Same—Fellow Servants—Instructions.—In such action, it was alleged that a vice principal was negligent in not giving a certain signal while plaintiff, a brakeman, was in a post of danger, and there was evidence tending to show that the signal had to be first received by the fireman. *Held*, that it was error to refuse to submit to the jury the question whether or not plaintiff and the fireman were fellow servants, an instruction for such purpose having been requested.

Same—Instructions.—Instructions not applicable to the case should not be given.

Same—Same.—Instructions calculated to mislead should not be given.

Contributory Negligence.*—When a vice principal, while order-

*See notes at end of case.

ing a subordinate into a post of obvious danger, assures him that he will take the necessary steps to protect him from the danger, the subordinate is not guilty of contributory negligence, as matter of law, in obeying such order.

Same.—The subordinate would not be guilty of contributory negligence in obeying such order, unless, notwithstanding such promise, the apparent danger was so great that a person of ordinary prudence would have refused to obey the order.

Same.—A servant in a post of danger is not precluded from recovering for injuries resulting from his failure to obey a signal given for his protection, when the danger had become so imminent as to deprive him of the capacity to act.

Fellow Servants.—A brakeman is the fellow servant of the engineer and fireman.

Same—Concurring Negligence.*—If a servant's injuries are the result of the negligence of a fellow servant, and such negligence on the part of master that without it the injuries would not have resulted, the master is liable.

Instructions.—A requested instruction not warranted by the evidence should be refused.

Same.—A requested instruction embracing nothing but a mere abstract proposition of law, should be refused, even if harmless.

Gross Negligence—Instructions.—Where the question of gross negligence is not involved in the case, it is improper to give a definition of, or allude to gross negligence in the charge.

Instructions.—In such an action it is not proper for the court to state general rules as to the duty of railroad companies to exercise proper care in running trains, when such rules are not applicable to the case.

Damages.—In an action for the death of an employee, by his widow and child, the measure of damages is a sum which will compensate plaintiffs for the loss of the pecuniary benefits they would have received from deceased had he not been killed; and it is improper to allude in the charge to the earnings of deceased as if they constituted the measure of damages.

Appeal—Record.—It is within the discretion of the appellate court to refuse to strike out the statement of facts upon the ground of a failure to comply with the rules in making it.

Same—Costs.—But the party responsible for such failure must be charged with the extra clerical work made necessary thereby.

APPEAL by defendants from Orange county district court. *Reversed.*

*See notes at end of case.

Baker, Botts, Baker & Lovett, Votaw, Martin & Chester, and *C. A. Teagle*, for appellants.

Holland & Link, A. C. Allen, Edgar Watkins, and *Frank C. Jones*, for appellees.

WILLIAMS, J. This was an action by the widow and child of William F. Carstens to recover damages for his death, which occurred October 18, 1896, while Carstens was in the employ of appellants as brakeman, and is alleged to have been caused by the negligence of two employees of appellants, a division superintendent and a conductor, both of whom had command, control, and superintendence of Carstens. Verdict and judgment were rendered for plaintiffs for $7,128, from which this appeal is prosecuted.

Case Stated.

Carstens was a brakeman in the crew of a wrecking train composed of engineer, fireman, and another brakeman, under the control of a conductor named Barbisch. On the occasion under consideration, the superintendent, W. B. Mulvey, was also present, directing the work, and exercising general control. The crew were engaged in removing from the track a car which had been wrecked. This was to be done by fastening the disabled car to a flat car at the rear end of the wrecking train, and pulling the former away. As the drawhead of the former car had been broken away, it was necessary to fasten a chain, first to some of the fixtures underneath it, and then to the drawhead of the flat car. The chain having been thus fastened to the wrecked car, the wrecking train, which was standing some distance away, was backed, in obedience to a signal from Barbisch or Mulvey, or both, and caught Carstens, who stood between the two cars, and killed him, the absence of the drawhead from the wrecked car allowing the two to come close together. The plaintiffs, by their pleadings and evidence, claim that before the train was backed, or as it was being backed, both Barbisch and Mulvey ordered Carstens to go between the cars for the purpose of fastening the chain to the drawhead of the flat car, and, upon his protesting that it was dangerous, peremptorily ordered him in, and at the same time, assured him that they would have the train stopped in time to prevent injury to him. There is evidence that the chain was long enough to permit the coupling to be made while the cars were five feet apart. There is evidence, also, that, if the signal to stop had been given in time to the engineer, he could have stopped the flat car close enough to the other to allow the coupling to be made, and at the same time to leave

a space of three or four feet between the cars. Carstens was out of sight of the engineer, who acted wholly upon signals from the conductor standing beside the track. The defendants, on the other hand, claimed and offered evidence tending to show that neither Barbisch nor Mulvey, nor any one else, gave the order or made the promise alleged by plaintiffs, but that Carstens went between the cars against their orders, and remained between them notwithstanding their remonstrances and orders to get out. There is an irreconcilable conflict of evidence on this point. Some of the testimony tends to show that, as the cars were moving back, both Mulvey and Barbisch ordered Carstens to come out, and that this was done in time to have enabled him, had he obeyed, to have escaped. Upon this point, also, the evidence conflicts.

Upon this state of the evidence, the appellants requested the following special charge, which was refused: "Although you may believe from the evidence that the conductor, J. W. Barbisch, or W. B. Mulvey, ordered Will F. Carstens to go between the cars and make the coupling, and that they, or either of them assured him that they would have the train stopped before it could or would hurt him, and that they, or either of them, told him afterwards, in time for him to have avoided the danger, to get out from between the cars, then the plaintiffs cannot recover, and you will find for the defendants." While the charge of the court contained general instructions upon contributory negligence, it gave no rule applicable to the state of facts supposed in the requested instruction. If those facts existed, they constituted a complete defense. The defendants had pleaded them, and offered evidence tending to establish them, and had the right to have the question submitted affirmatively. The requested charge was not upon the weight of evidence, nor was it objectionable as selecting and laying stress upon particular parts of the testimony. It sought simply to procure the submission of a substantive defense. To a complete submission of this issue some further explanation would have been proper, as will be indicated further on; but the charge requested was sufficient to call the court's attention to the point, and require its submission.

Death of Employee—Contributory Negligence—Instructions.

Another charge requested sought to have the jury instructed that the engineer and fireman were fellow servants of Car-

stens; that, if his death was caused by their negligence, plaintiffs could not recover. The defendants pleaded this defense, and, if there was evidence tending to establish it, they were entitled to have an affirmative submission of it. The conductor, in one part of his testimony, says he gave the signal to stop in time to have enabled those on the engine, had they heeded it, to have stopped before injuring Carstens. The signal had to be received by the fireman, and by him repeated to the engineer. This was enough to require the court to leave the question to the jury. The charge requested, however, needed a qualification, which will be stated below.

Same—Fellow Servants—Instructions.

The charges requested stating the rules applicable in cases where an employee seeks to recover because of defective machinery, and as to the effect of his knowledge or means of knowledge of the defects, had no application to the case. Others, on the subject of assumption of ordinary risks, and as to the effect of knowledge on the part of deceased of the danger, did not state the issues upon which a proper decision of the case depended, so as to aid the jury in coming to a verdict, and hence were calculated to mislead.

Same—Instructions.

Same—Same.

We can make our views plain by stating the rules upon which the decision of the case must depend. The right of plaintiffs to recover must depend upon proof of the facts alleged by them as constituting the negligence; that is, that Carstens' superior ordered him between the cars to make the coupling, and undertook to have the car stopped in time to prevent injury to him. The danger to be incurred was open to his observation, and was as well known to him as to the conductor and superintendent; and, if, against orders, or without the order or assurance of protection, he entered between the cars, he thereby took upon himself the risks resulting. But it does not follow that he assumed the risk or was guilty of negligence if he acted upon the order of his superiors, coupled with an assurance of protection, or upon such orders as implied such an assurance. The case is not like that of Railway Co. *v.* Drew, 59 Tex. 10, and others of that class, where an employee uses machinery, known to him to be dangerous, in obedience to orders of the master. By so doing, he incurs a risk while he is using the defective instrument which is at the time beyond the master's control. Here the evidence tends to show that it was in the

power of the master, when requiring the servant to perform the particular service, to afford him protection against the danger arising from it. Consequently, it should not be held as matter of law that, in obeying an order accompanied by such an assurance, or of such a nature as to carry with it an implication that protection would be given, the servant assumes the risk or is guilty of contributory negligence. If, therefore, it should be found that the danger to be incurred by Carstens in taking his station was such that his superiors, by the use of such care as men of ordinary prudence would employ in like situations, could protect him against it, by causing the train to be stopped, and that either of such superiors ordered him to take such station, in such way and under such circumstances as to reasonably justify Carstens in believing that such protection would be given, and if such superiors failed to use such care, as is just defined, to cause the train to be stopped in time to save Carstens from injury, and as a result of such want of care he was killed, defendants would be liable, unless, notwithstanding such order and promise, the danger to be incurred by Carstens was so great and apparent that a person of ordinary prudence, acting in his situation, would not have exposed himself to it, or unless, after having thus induced him to go in, one or both of his superiors ordered him to come out, at such time and under such circumstances that, with ordinary care, he could have escaped. If, however, the order to come out, if given at all, was given when his danger was so imminent as to deprive him of the capacity to act with that circumspection that ordinarily guides the conduct of men of ordinary prudence, and if this danger had been brought upon him by the negligence of the superior who had assumed the duty of stopping the train, if such duty had been assumed, in failing to use proper care to stop it, then the fact that under such circumstances Carstens did not act prudently, if it be a fact, would not preclude recovery. Railway Co. *v.* Neff, 87 Tex. 303, 28 S. W. 283; Railway Co. *v.* Watkins, 88 Tex. 26, 29 S. W. 232. If the superior who gave the assurance or protection, as above specified, if one was given, did all that was incumbent on him to stop the train, and its failure to stop was not caused or contributed to by any failure on his part to exercise ordinary

Contributory Negligence Per Se.

Same.

Same.

care, then there could be no recovery. If the coming together of the cars resulted from negligence of the engineer and fireman, or either of them, in failing to heed signals, and was not contributed to by negligence of Carstens' superior in failing to do what he should have done to have the train stopped, defendants are not liable. But if the engineer and fireman were guilty of negligence which helped to cause Carstens' death, and the superior was also guilty of negligence without which such death would not have occurred, so that the negligence of both concurred in producing the result, then defendants would be liable.

Fellow Servants.

Same—Concurring Negligence.

A special charge was asked by defendants submitting the proposition that if Carstens, though ordered in with assurance of protection, and not ordered out by his superiors, discovered or should have discovered the danger from the approaching train in time to have gotten out, this would prevent a recovery. The proposition is substantially true in theory, but we discover nothing in the evidence presented in the briefs to make it applicable. If the circumstances justified him in going in, relying on the duty assumed by the superior of stopping the train, he could continue to rely upon it until it became or should have been apparent to him that the superior would not perform such duty. But if it so became apparent in time for him to act with ordinary prudence, and to get out with ordinary diligence, plaintiffs could not recover. As we have said, we do not see that the evidence raises this question; but, if it should do so upon another trial, of course proper instructions should be given concerning it.

Instructions.

Complaint is made of the instruction in the charge that "the acts or omissions or negligence of their agents, servants, or employees are the acts of corporations." It was probably harmless, but it is a pure abstraction, which might properly be omitted. A charge should be directed to the particular facts upon which the case depends.

Same.

No other portions of the charge are assigned as error, but we deem it proper, in view of another trial, to notice some other instructions, the repetition of which might occasion trouble.

It is not necessary that plaintiffs, in order to recover, should show that the conductor or superintendent was guilty of

gross negligence, or that, to defeat the action on the ground of contributory negligence on the part of Carstens, if such there was, it should have been gross. Ordinary negligence would be sufficient for either purpose. As no recovery of exemplary damages is sought, no definition of or allusion to gross negligence is proper, since it would only serve to complicate the subject, and possibly to confuse the minds of the jurors. General rules are also given as to the duty of railroad companies to exercise proper care in operating their cars and trains, which are entirely inapplicable to the case. We have endeavored to state the questions upon which the submission should be made. The part of the charge just referred to should be omitted. The duties of both parties arose out of the particular facts existing at the time of the transaction in question, and have already been indicated, and the instructions should be directed to these. In one part of the charge, allusion is made to the earnings of Carstens, as if they constituted the measure of damages. This may be corrected in another part of the charge, but is likely to produce an incorrect impression on the jury. The recovery is not, of course, to be equal to what the earnings would have been, but is to be a sum which will compensate plaintiffs for the loss of the pecuniary benefits they would have received from Carstens had he not been killed.

Gross Negligence—Instructions.

Instructions.

Damages.

A motion has been made to strike out the statement of facts, on the ground that it was not made out in accordance with the rules. It is made to appear that the parties failed to agree, and that the statement in the record is that which appellant presented to the presiding judge. It is far more voluminous than there is any necessity for it to be, as is apparent from the comparatively small space in which the parties, in their briefs, have stated all the facts considered material. The facts having been so condensed in the presentation of the case that the failure to comply with the rules in making the statement has not delayed a decision, we do not think it proper to strike out the statement. But as its unnecessary length is attributable to the fault of appellants, which has caused unnecessary expense in copying it into the record, we think appellants should be charged with such expense. While the judgment is reversed at the cost of appellees, the

Appeal—Record.

Same—Costs.

cost of copying the statement in the transcript will be adjudged against appellants. Reversed and remanded.

NOTES.

Contributory Negligence—Error in Avoiding Danger—Reliance upon Promises.—Contributory negligence will not be imputed as a matter of law to a plaintiff whom terror or excitement, brought about by the negligence of defendant, causes to act erroneously or to adopt a perilous alternative in endeavoring to escape the injury which such negligence threatens. The same holds true where the conduct of the defendant has led the plaintiff to believe himself secure and he is then confronted with unexpected danger through the former's negligence. Nor will contributory negligence be imputed to him where he relied upon the defendant's assurances of safety and incurred a danger from which it was not obviously certain that harm would follow.

United States.—Killien *v.* Hyde, 63 Fed. 172.

Alabama.—Cook *v.* Central, etc., R. Co., 67 Ala. 533; Cook *v.* Parham, 24 Ala. 21; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141.

California.—Karr *v.* Parks, 40 Cal. 188.

Georgia.—Western, etc., R. Co. *v.* Wilson, 71 Ga. 22.

Illinois.—Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510, 5 Am. Rep. 60; Wesley City Coal Co. *v.* Healer, 84 Ill. 126; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242; Dunham Towing, etc., Co. *v.* Dandelin, 143 Ill. 409.

Indiana.—Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149, 13 Am. & Eng. R. Cas. 1; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; Indianapolis, etc., R. Co. *v.* Carr, 35 Ind. 510; Clarke *v.* Pennsylvania Co., 132 Ind. 199.

Kansas.—Edgerton *v.* O'Neil, 4 Kan. App. 73.

Kentucky.—South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206.

Maryland.—Baltimore, etc., R. Co. *v.* Leapley, 65 Md. 571, 27 Am. & Eng. R. Cas. 169.

Massachusetts.—Ingalls *v.* Bills, 9 Met. (Mass.) 1, 43 Am. Dec. 346.

Michigan.—Harris *v.* Clinton Tp., 64 Mich. 447, 8 Am. St. Rep. 842; Barnes *v.* Brown, 95 Mich. 576.

Mississippi.—Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444.

Missouri.—Kelly *v.* Hannibal, etc., R. Co., 70 Mo. 604; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371; Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Bischoff *v.* People's R. Co., 121 Mo. 216.

Nebraska.—Lincoln Rapid Transit Co. *v.* Nichols, 37 Neb. 332.

Notes

New York.—Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; McIntyre *v.* New York Cent. R. Co., 37 N. Y. 287; Canton *v.* Simpson, 2 N. Y. App. Div. 561; Akers *v.* New York, 14 Misc. Rep. (N. Y. C. Pl.) 524; Dyer *v.* Erie R. Co., 71 N. Y. 228; Heath *v.* Glens Falls, etc., St. R. Co., 90 Hun (N. Y.) 560; Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Roll *v.* Northern Cent. R. Co., 80 N. Y. 647; Voak *v.* Northern Cent. R. Co., 75 N. Y. 320; Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Baber *v.* Broadway, etc., R. Co., 10 Misc. Rep. (N. Y. C. Pl.) 109.

North Carolina.—Lambeth *v.* North Carolina R. Co., 66 N. Car. 494, 8 Am. Rep. 508.

Ohio.—Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451.

Pennsylvania.—Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323, Thomp. Car. of Pass. 252; Delaware, etc., Canal Co. *v.* Webster, (Pa. 1886) 6 Atl. Rep. 841, 27 Am. & Eng. R. Cas. 160; Johnson *v.* West Chester, etc., R. Co., 70 Pa. St. 357; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60, 78 Am. Dec. 322; Neilson *v.* Hillside Coal, etc., Co., 168 Pa. St. 256, 47 Am. St. Rep. 886.

Tennessee.—Southern R. Co. *v.* Pugh, 97 Tenn. 624.

Texas.—International, etc., R. Co. *v.* Neff, 87 Tex. 303.

Virginia.—Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 Va. L. J. 203.

West Virginia.—Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570.

Wisconsin.—Pool *v.* Chicago, etc., R. Co., 53 Wis. 659, 3 Am. & Eng. R. Cas. 332; Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304; Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459; Berg *v.* Milwaukee, 83 Wis. 599.

Same—Same—Proximate Cause.—And the defendant's negligence is, where there was no previous negligence on the plaintiff's part, the proximate cause of an injury so received, although the plaintiff might have escaped injury but for his terror and excitement.

United States.—Greenwood *v.* Westport, 60 Fed. Rep. 560; Haff *v.* Minneapolis, etc., R. Co., 14 Fed. Rep. 558; Stevenson *v.* Chicago, etc., R. Co., 18 Fed. Rep. 493; Collins *v.* Davidson, 19 Fed. Rep. 83.

Illinois.—Frink *v.* Potter, 17 Ill. 406; Durham Towing, etc., Co. *v.* Dandelin, 143 Ill. 416; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 29; Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682.

Indiana.—Turner *v.* Buchanan, 82 Ind. 147, 42 Am. Rep. 485.

Iowa.—Moore *v.* Central R. Co., 47 Iowa 688.

Minnesota.—Mark *v.* St. Paul, etc., R. Co., 30 Minn. 493, 12 Am.

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& Eng. R. Cas. 86; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 37 Am. Rep. 410.

Missouri.—Siegrist *v.* Arnot, 10 Mo. App. 197.

Nebraska.—Omaha St. R. Co. *v.* Cameron, 43 Neb. 297.

New York.—Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Coulter *v.* American Merchants' Union Express Co., 56 N. Y. 585.

Ohio.—Iron R. Co. *v.* Mowery, 36 Ohio St. 418, 3 Am. & Eng. R. Cas. 361, 38 Am. Rep. 597.

Pennsylvania.—Pennsylvania R. Co. *v.* Werner, 89 Pa. St. 59; Pittsburgh, etc., R. Co. *v.* Rohrman, (Pa. 1883) 12 Am. & Eng. R. Cas. 176, and 180 *note*.

Virginia.—Richmond, etc., R. Co. *v.* Morris, 31 Gratt. (Va.) 200; Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 Va. L. J. 203.

Wisconsin.—Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

Illinois.—Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373.

Indiana.—Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210.

Massachusetts.—Frost *v.* Grand Trunk R. Co., 10 Allen (Mass.) 387, 87 Am. Dec. 668.

Pennsylvania.—Pennsylvania R. Co. *v.* Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

Concurring Negligence of Master and Fellow Servant.—It is well settled upon principle and authority, that if the negligence of a master contributes to an injury to his servant, it must necessarily become an immediate cause of the injury, and it is no defense that a fellow servant was likewise guilty of wrong. The cases affirming this proposition are numerous, and the doctrine is supported with a unanimity not to be found among the authorities on any other branch of the law of fellow servants. The rule is most frequently applied to cases of injuries caused by defective machinery. A master who is bound to provide safe machinery for the use of his servants is not relieved from responsibility to an employee for neglect of that duty, by the fact that a fellow servant may have been guilty of negligence in using the unsafe apparatus which was committed to him to use. Ransier *v.* Minneapolis & St. L. R. Co., 32 Minn. 331, 21 Am. & Eng. R. Cas. 601; Cone *v.* Delaware, L. & W. R. Co., 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. Rep. 363; Union Pac. R. Co. *v.* Callaghan, 56 Fed. Rep. 988; Grand Trunk R. Co. *v.* Cummings, 11 Am. & Eng. R. Cas. 254, 12 Am. & Eng. R. Cas. 204, 106 U. S. 700, 1 Sup. Ct. Rep. 493; Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. Rep. 144; Pullman Palace Car. Co. *v.* Laack, 143

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Ill. 242, 32 N. E. Rep. 285; Smith *v.* Potter, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273; Hunn *v.* Michigan C. R. Co., 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502; Franklin *v.* Winona & St. P. R. Co., 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 34 N. W. Rep. 898, 5 Am. St. Rep. 856; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. Rep. 1103; Murphy *v.* St. Louis & I. M. R. Co., 4 Mo. App. 565; reversed on other grounds in 71 Mo. 202; Paulmier *v.* Erie R. Co., 34 N. J. L. 151; Pullutro *v.* Delaware, L. & W. R. Co., 27 N. Y. S. R. 63, 7 N. Y. Supp. 510; St. Louis & S. F. R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. Rep. 789; Gulf, C. & S. F. R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. Rep. 151; Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. Rep. 205; Stetler *v.* Chicago & N. W. R. Co., 46 Wis. 497, 21 Am. Ry. Rep. 402; Cowan *v.* Chicago, M. & St. P. R. Co., 80 Wis. 284, 50 N. W. Rep. 180.

That the negligence of the master is slight does not take the case out of the rule, provided such negligence contributed to produce the injury. O'Laughlin *v.* New York C. & H. R. R. Co., 9 N. Y. S. R. 384, 45 Hun 588, *mem.*; *affirmed in* 113 N. Y. 623, *mem.*, 20 N. E. Rep. 876, *mem.*, 22 N. Y. S. R. 992, *mem.* In Coppins *v.* New York Central & Hudson River R. Co. (N. Y.), 44 Am. & Eng. R. Cas. 618, it was held that the master is not excused from liability for injury to one of his servants, which would not have happened if the master had performed his duty, by the fact that the negligence of fellow servants also contributed to the injury. See also New Jersey & N. Y. R. Co. *v.* Young, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428; *affirming* 46 Fed. Rep. 160; Knahtla *v.* Oregon S. L. & U. N. R. Co., 21 Oreg. 136, 27 Pac. Rep. 91.

In Cone *v.* Delaware, L. & W. R. Co., 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57, it was held that where the employee of a railroad corporation was injured by the sudden starting of a locomotive caused by its being defective and out of repair, of which defects the corporation had notice, it is no defense that the engineer could have so managed the engine as to have prevented the accident. The court said: "If this doctrine is accepted it will loosen the rule of responsibility which now bears none too closely upon corporate conduct. It will seldom happen that unusual care on the part of an engineer would not prevent an accident. In this case he might have opened the cocks, or blocked the wheels, or with extreme care so separated the engine from its train that the two should occupy separate tracks. It now seems that it would have been well to have done one or the other of these things. His omission to do so may have been negligence towards the defendant, but it does not remove the responsibility which attached to it, to furnish good and suitable machinery, or place it upon a subordinate whose duty is to be measured by the degree of

skill necessary for its management, and who is not called upon to make good the want of corporate care and attention.

In Elmer *v.* Locke, 135 Mass. 575, 15 Am. & Eng. R. Cas. 300, it was held that a brakeman in the employ of a railroad company may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall was partly caused by the defective construction of the trestle work and partly by the negligence of the fellow servants of the plaintiff. In speaking of the liability of the company in this case, the court said: "Apparently the train escaped from proper control by neglect of some of those who had the management of it, and who were fellow servants of the plaintiff, engaged in the common employ of conducting it. This would not be sufficient to excuse the defendant, if he was in fact responsible for the defective construction of the trestle work. It does not exonerate him from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that, if others for whom he is not responsible had performed their duty, the injury would not have occurred, or that it might have been avoided by care and vigilance on the part of those who were clearly the fellow servants of the plaintiff in the transaction. Cayser *v.* Taylor, 10 Gray, 274, 281; Eaton *v.* Boston & Lowell Railroad, 11 Allen, 500; Simmons *v.* New Bedford, Vineyard & Nantucket Steamboat Co., 97 Mass. 361, 368; Lane *v.* Atlantic Works, 111 Mass. 136."

A leading case upon this subject is that of Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 11 Am. & Eng. R. Cas. 254. In this case it was held that in an action for damages for personal injuries caused by a collision between two trains of cars, an instruction to the effect that if the negligence of the company had a share in producing the injury, the company is liable, even though the negligence of a fellow servant was contributory also, is not erroneous; for if the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.

In Franklin *v.* Winona & St. Peter R. Co., 37 Minn. 409, 31 Am. & Eng. R. Cas. 211, the court applied the principle that if the negligence of a master combines with the negligence of a fellow servant, and the two contribute to cause the injury of another servant, the master is liable, to a case where a brakeman was killed by falling into an uncovered space between the ties of the defendant's track while making a coupling, and the defendant contended that the conductor and engineer of the train knew of the location of the cul-

vert into which the brakeman fell, and therefore their attempt to have the coupling made at that place was the negligence of the brakeman's fellow servants, for which defendant was not liable, the court saying: "It is well settled that if the negligence of a master combines with the negligence of a fellow servant, and the two contribute to the injury of another servant, himself free from negligence, the master is liable."

In Ellis *v.* New York, L. E. & W. R. Co., 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641, the action was brought for the death of a brakeman, killed in a collision by being crushed between two cars furnished with buffers which overlapped each other, and which were useless. The defendant contended, that the negligence, if any, was that of the person making up the train who was the fellow servant of deceased; but the court held that this defense was invalid, saying: "This rule (the fellow servant rule) however, has no application if the company has at the same time disregarded its obligation to provide either a suitable roadbed, or engines, cars, or other necessary appointments of the railroad, so that the injury is not entirely caused by the negligence of the fellow servant, but is in part, at least, the result of that omission of duty. In such a case, the negligence of the co-servant will not exonerate the company from the consequences of its own default."

In Hunn *v.* Michigan Central R. Co., 78 Mich. 513, 41 Am. & Eng. R. Cas. 452, it was held that where an employer has been guilty of negligence, causing an injury to one of his servants, the fact that the negligence of a fellow servant contributed to cause the injury will not bar a recovery.

In Booth *v.* Boston & A. R. Co., 73 N. Y. 38, it was held that where the negligence of an engineer of a train in running it, is contributory with that of the company in not sending out a sufficient number of brakemen, and both together cause an injury to an employee, the negligence of the engineer does not relieve the company from liability.

In Stetler *v.* Chicago & N. W. R. Co., 46 Wis. 497, the action was to recover damages for injuries sustained by a fireman. The injury was caused by the engine being thrown from the track owing to the giving way of the rails at a place where the ties were defective and rotten and where there was a short rail in the track. The defendant attempted to escape liability on the ground that the act of plaintiff's co-employees in backing the train at excessive speed had a direct tendency to cause the accident. But the court held that the company was liable for its negligence directly contributing to the injury, although it also appeared that the negligence of a co-employee contributed to such injury.

Notes

In Paulmier *v.* Erie R. Co., 5 Vroom (N. J.), 151, the court held, that where the track of a railroad company over a trestle work is not capable of supporting an engine, and the engineer in charge had orders not to put his train thereon, which orders he disobeyed, and the intestate of the plaintiff who was a fireman on such engine and who was unaware of said orders or to the danger, was thereby killed, owing to the trestle work giving way, the plaintiff was entitled to recover, on the ground that the death was occasioned in part by the want of care in the defendant, the railroad company with respect to said trestle work, and the fact that the injury was partially brought about by the negligence of a fellow servant did not relieve the company from such liability.

In Atchison, T. & S. F. R. Co. *v.* Holt, 29 Kan. 149, 11 Am. & Eng. R. Cas. 206, the injured employee was an engine wiper, and was injured in consequence of the engine moving upon his hand, while he was underneath it. It was shown that the engine was defective and dangerous. The defendant contended that no recovery could be had, because the person in charge of the engine might have prevented the injury, which was therefore attributable to the negligence of a co-employee. The court held, however, that the plaintiff was entitled to recover, saying: "The argument of counsel is not sound, because if the negligence of the master or employer combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master."

In McMahon *v.* Henning, 1 McCrary (C. C.), 516, plaintiff sued for injuries received while coupling cars. He alleged that the defendant was guilty of negligence in using defective cars with dangerous coupling apparatus. Defendant contended that the injury was the result of the negligence of a co-employee, but the court held that the company was liable.

Cayzer *v.* Taylor, 10 Gray (Mass.), 281, was a case in which a servant sued his master for injuries from the collapse of a steam boiler used in the defendant's manufactory in which the plaintiff was employed. The court in its opinion said: "But we are not prepared to say that if one uses a dangerous instrumentality, without the safeguards which science and experience suggest, or the positive rules of law require, he is not responsible for an injury resulting from such use because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury."

If a brakeman, employed on a train of cars by the proprietors of a railroad, sustains an injury in consequence of the carelessness of another brakeman employed in the same service, and the injury would not have happened if the latter had performed his duty, it is.

immaterial, as respects the liability of the proprietors of the road, whether the train was short of hands or not. Hayes *v.* Western R. Corp., 3 Cush. (Mass.), 270.

Clark *v.* Soule, 137 Mass. 380, was an action by a workman against his employer, for personal injuries caused by the fall of a staging upon which he was at work. It was in dispute whether the defendant undertook to furnish the staging as a completed whole, or whether he undertook merely to provide, and did provide, a quantity of staging materials from which fellow servants of the workman erected the staging. The judge instructed the jury that a master is liable to his servant for injuries resulting from defective materials negligently furnished by him, although the negligence of a fellow servant contributes to the accident; and, on the question whether the obligation of the master extended to the furnishing of the staging as a completed structure, read the instructions requested by each party, and instructed the jury, that, if the plaintiff's theory was correct the instructions he asked for were law; and that if the defendant's theory was correct, the instructions he asked for were law. *Held*, that the plaintiff had no ground of exception.

In Crutchfield *v.* Richmond, etc., R. Co., 76 N. Car. 320, a railroad company was held liable to one of its employees, not chargeable with contributory negligence, for injuries received through the negligent management by another employee of a defective and unsuitable engine furnished by the company.

In Stringham *v.* Stewart, 100 N. Y. 546, it was held that the fact that a fellow servant, may by care and caution operate a defective and dangerous machine, so as to produce no injury to others, does not exempt the master from his liability for an omission to perform the duty which the law imposes upon him to exercise reasonable care and prudence in furnishing safe and suitable appliances for the use of his servants.

But in Potts *v.* Port Carlisle Dock & R. Co., 2 L. T. (N. S.), 283, the accident was caused partly by the carelessness of a fellow servant and partly by the defective construction of a turntable, and it was held that the employee could not recover.

BENSON

v.

CHICAGO, ST. P., M. & O. RY. CO.

(*Supreme Court of Minnesota, Jan. 5, 1899.*)

Injury to Employee—Statutory Provision—"Cars" Include Hand Cars.*—Laws Wis. 1893, c. 220, provides that "every railroad or railway company operating any railroad * * * within this state shall be liable for damages sustained within the state, by an employee of such company without negligence on his part * * * while such employee is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines or cars and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company." *Held*, that the words "or other * * * cars" include hand cars.

(Syllabus by the Court.)

APPEAL by plaintiff from Hennepin county district court. *Reversed.*

Arctander & Arctander, for appellant.
L. K. Luse (*Thomas Wilson*, of counsel), for respondent.

MITCHELL, J. This action was brought to recover damages for personal injuries sustained in the state of Wisconsin while the plaintiff, in the performance of his duty as an employee of the defendant, was engaged in propelling a hand car over defendant's railway; the injury being caused by the alleged negligence of other employees of the defendant, in carelessly and without notice running another hand car into and against the one which the plaintiff was propelling. The action was brought under Laws Wis. 1893, c. 220, and the only question is whether the facts alleged in the complaint bring the case within the provisions of this statute.

*See Ean *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 9 Am. & Eng. R. Cas., N. S., 475.

The statute, so far as here material, reads as follows: "Every railroad or railway company operating any railroad or railway the line of which shall be in whole or in part within this state shall be liable for damages sustained within this state, by an employee of such company without negligence on his part * * * while such employee is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines or cars and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of, or for failure to discharge his duties as such." Defendant's counsel concede that the facts alleged bring the case within all the conditions of the statute, except that the plaintiff at the time he received the injury was not "engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines or cars," within the meaning of the statute,— their particular contention being that the words "or other cars" do not include hand cars; that in view of the connection in which they are used, and under the familiar rules of *noscitur a sociis* and *ejusdem generis*,the words "or other cars" must be limited to cars of like kind to those previously enumerated, *viz.* "passenger and freight [cars], or other trains and engines,"—that is, to cars used on trains operated on the road, and intended to be propelled, and usually propelled, by steam. And this contention they seek to enforce by the suggestion that in popular speech the words " railway cars," without any qualifying or explanatory prefix, do not include hand cars.

So far as we are advised, this act has come before the supreme court of Wisconsin for consideration only in the cases of Smith *v.* Railway Co., 91 Wis. 503, 65 N. W. 183; Ean *v.* Railway Co., 95 Wis. 69, 9 Am. & Eng. R. Cas., N. S., 475, 69 N. W. 997; Andrews *v.* Railway Co., 96 Wis. 348, 71 N. W. 372; and, by implication in Hibbard *v.* Railway Co., 96 Wis. 443, 71 N. W. 372. Unfortunately for us,in none of these cases was the question now presented considered or decided. Only two questions as to the construction of the statute seem to be settled by these cases, *viz.:* (1) That, to bring a case within its provisions, the employee must have received his injuries while "engaged in operating, running, riding upon,or switching passenger or freight or other trains, engines, or cars;" and (2) that it is immaterial by what kind

of power the cars, etc., are being propelled at the time the employee receives the injuries. We have, therefore, to meet the question as *res integra.*

The purpose or aim of all rules of statutory construction is to ascertain the legislative intent. They are all but aids to this end. It is perfectly evident from the general scope of the act, and from the context, that the word "cars" refers only to railroad cars. To that extent it is legitimate to resort to the rules of construction invoked by defendant's counsel. The words "railroad cars," in their general sense, include, "hand cars"; for they are constructed and used for running on the lines of rails of a railroad,—being propelled by hand by those riding on them, through the aid of cranks and gearing. They would therefore be within the purview of the statute, unless there is something in the context or in the subject-matter or the object of the act which shows that the legislature did not intend to include them. It is very manifest that the statute was designed for the protection and benefit of the class of railroad employees engaged in operating, running, or riding upon railroad cars, trains, and engines, while so engaged in the performance of their duty, by giving them a right of action for injuries thus received caused by the negligence of their fellow servants. It doubtless proceeds upon the theory that railway employees, while thus engaged, are exposed to peculiar and extraordinary perils, from the negligence of their co-employees, against which they are, for various reasons, especially unable to protect themselves. These considerations apply to those operating or riding upon hand cars as well as to those operating or riding upon any other railroad cars,—not to the same degree, perhaps, as to dangers connected with the motive power of the car operated or ridden upon, but to an even greater extent as to dangers resulting from the negligence of those operating or running other cars, trains, or engines. In short, operating, running, or riding upon hand cars is "within the mischief" of the statute, and there is apparently no good reason why the legislature should have excluded it. This is not necessarily conclusive, but it is a good reason why a court should not exclude it by construction, unless it is clear from the language of the statute that the legislature so intended. We find nothing in the statute that would justify a court in holding that the legislature intended to exclude hand cars from its operation. A court has no right to resort to the maxims of *noscitur a sociis*

or *ejusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class. Hand cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute. There is nothing in the statute requiring that the car be connected with a locomotive, or with other cars forming a train, or that it must be made to be propelled by any particular kind of power, in order to bring a case within its operation. We do not think that the fact that the word "cars" is enumerated with "trains" and "engines" restricts its meaning to cars propelled by engines, or to cars usually operated as part of a train. Eliminating, as we think we may for present purposes, the words "trains" and "engines," this clause would read, "while engaged in operating," etc., "passenger or freight or other cars." Order reversed.

HOUSTON, E. & W. T. RY. CO.

v.

RUNNELS.

(*Supreme Court of Texas, Nov. 28, 1898.*)

Actions for Personal Injuries—Credibility of Employees—Question for Jury.*—In an action for personal injuries plaintiff relied solely upon his own testimony for a recovery, and, as to the main facts attending the injury, there was, between plaintiff, and certain employees of defendant who testified for defendant, a positive conflict of testimony, and such employees bore such a relation to the facts of the case as to make them guilty of the negligence causing the injuries, if the testimony of plaintiff was true. *Held*, that it was reversible error to give a charge from which the jury could possibly

*See note at end of case.

infer that it was the opinion of the court that such employees were prejudiced, to decide as to the credibility of witnesses being solely within the province of the jury.

Same.—And such error was not cured because the jury were also instructed in such charge to consider "all other facts and circumstances in the case."

ERROR by defendant to court of civil appeals of First supreme judicial district. *Reversed.*

Baker, Botts, Baker & Lovett, J. C. Feagin, and *O. S. Parker,* for plaintiff in error.

Branch, Garrison & Blount, for defendant in error.

BROWN, J. We copy the following facts found by the court of civil appeals: "Appellee, who was a wood chopper in the employment of the appellant, and as such was accustomed to traveling upon passes upon freight trains over its road, on the 11th day of July, 1896, at Houston, procured a pass entitling him to travel from that place to Humble. He resided near the railroad, at a point about three miles beyond Humble from Houston. There was a wood yard near his home, at which such trains sometimes stopped to take on wood. He entered a freight train, and traveled upon it to and beyond Humble, at which place no stop was made. The trains did not always stop there, and appellee did not insist upon having this train stop there. When the train reached the neighborhood of appellee's house, the conductor ordered the brakeman to flag the engineer to stop, which was done; and the speed of the train was reduced to a rate slow enough to have enabled appellee to get off safely, and the conductor directed appellee to get ready and get off. Appellee went out of the caboose, in obedience to this direction, and stood upon the step, which was wet and slippery, waiting to get off, when there came a sudden jerk, which caused him to slip and fall from the step, still holding the handrail. He was thus pulled some distance, until his foot or clothing was caught by a spike, and he was then jerked to the ground, suffering severe injuries. The evidence conflicts as to the circumstances under which he left the caboose; the conductor and brakeman stating that he did so, not only without any direction, but against the orders of both of them. This conflict was submitted by the charge, and we find the above facts in support of the verdict. We also conclude that appellant's servants were guilty of negligence in thus acting

Case Stated.

and operating the train, and that appellee was not guilty of negligence. The sufficiency of the evidence to sustain the verdict is not questioned by the assignments. The appellant introduced evidence tending to show that appellee had made statements concerning the transaction in conflict with his testimony, and tending to show that his general character for truthfulness was bad. Appellee undertook to explain the one and to rebut the other by evidence as to his good character for veracity. Appellant, in cross-examination of appellee, showed that he had been convicted of theft, a misdemeanor; and appellee was then allowed, over objection to testify to facts showing that he was not guilty, but had been wrongfully convicted. The conviction took place six or seven years before this trial."

The plaintiff relied solely upon his own testimony for a recovery. As to the main facts attending the injury, there was, between the plaintiff and two of the defendant's employees who testified, as positive a conflict as can be produced by opposing affirmative and negative statements. The conductor and the brakeman bore such a relation to the facts of the case as made them guilty of negligence, if the statements of the plaintiff were true, and they might "apparently" be prejudiced against the plaintiff. The judge of the trial court instructed the jury as follows: "If you should find there to be a conflict in the evidence, it will be your duty to reconcile such conflict, if you can, so as to give credit to the whole of the testimony. If you should be unable to reconcile such testimony, then you must decide for yourselves as to which testimony you will believe; and, in determining what weight you will give the testimony of any witness testifying in the case, you are authorized to consider age, intelligence, their manner of testifying, their apparent prejudice, if any, and all other facts and circumstances in the case, and you can give to such witness testifying in the case such weight and credit as you see fit." The law does not impose upon a jury the duty of reconciling a conflict in the testimony of witnesses. It is impossible to reconcile positive and unequivocal affirmative and negative evidence. Seeming conflicts may be shown not to exist, but a real conflict between witnesses can only be disposed of by discarding the testimony on one side of the issue. It is the province of the jury to pass upon the credibility of the witnesses, and they may disregard the testimony of a witness who has neither been impeached nor contradic-

Actions for Personal Injuries—Credibility of Employees—Question for Jury.

ted, if they believe his statements to be untrue from his manner of testifying, prejudice exhibited towards the opposite party, or his interest in the result of the litigation, or other things indicating that the evidence is not reliable. Cheatham *v.* Riddle, 12 Tex. 112; Coats *v.* Elliott, 23 Tex. 613. The law has not, however, prescribed as test of credibility the demeanor of a witness, his prejudice, etc., but courts have refused to set aside verdicts rendered upon conflicting testimony, when the apparent weight was against the finding of the jury, and in support of their rulings have generally assigned the reason that the witnesses were before the jury, who had the opportunity to see their manner of testifying, to observe whether they disclosed prejudice in the case, and other matters which would indicate the want of truth in their statement, either from intentional misstatement, or from other causes, and might have discredited some of them, making the weight of the credible evidence to differ from that which appears of record. This is a rule by which courts are governed, and not to control juries in passing upon the credibility of witnesses. While a jury may consider everything named in the charge, it is not proper for a judge who presides at a trial to prescribe them as tests to be applied by the jury, because in so doing he comments upon the weight of the testimony. Dwyer *v.* Bassett, 63 Tex. 277; Willis *v.* Whitsitt, 67 Tex. 677,4 S. W. 253; Davidson *v.* Wallingford, 88 Tex. 624, 32 S. W. 1033. In the case last cited, CHIEF JUSTICE GAINES said: "The court should simply have charged that the jury were the judges of the credibility of the witnesses and the weight of the evidence. The effect of the instruction was to lead the jury to believe that there was more question as to the credibility of the witness who was named than as to that of the other witnesses. Whether such was the fact or not is a matter soley for the determination of the jury, without any intimation, either direct or indirect, as to the opinion of the judge." CHIEF JUSTICE WILLIE, in commenting upon a very similar charge, in the case of Willis *v.* Whitsitt, cited above, said: "The appellee was the only witness examined who had any real pecuniary interest in the suit. By giving the charge the court would have said, in effect, that the jury should take into consideration the appellant's interest, in determining whether or not they should believe his testimony. Such a charge is virtually upon the weight of the evidence, tending to make the jury believe that in the opinion of the judge the testimony of a

particular witness was not entitled to much weight in making up their verdict. Such a charge is inconsistent with the freedom allowed to the jury in passing upon the weight of testimony and the credibility of witnesses." The charge before us virtually called the attention of the jury to the fact that some of the defendant's witnesses might be prejudiced, and invoked their attention to it in determining the conflict between them and plaintiff. Dwyer *v.* Bassett, cited above. In that case the court said: "The mere fact that such a charge was given was calculated to influence the jury to believe that, in the opinion of the court, there were 'attendant circumstances' which would authorize them to disregard his testimony; for unless there be evidence to authorize the giving of the charge, it should not be given." If the judge did not believe there was "apparent prejudice," why mention it?

It is claimed by counsel for the defendant in error that the charged complained of in the present case was not objectionable, because it did not confine the jury to the things par-

Same.

ticularly specified, but authorized them to consider "all other facts and circumstances in the case." The error consisted in specifying the particular things which the jury might consider, which things, in the state of the facts before the court, pointed with more or less force to particular witnessess who had testified in the case, and was not cured by referring to all other facts. The court erred in giving this charge to the jury, for which the judgment must be reversed.

We have examined the other grounds of error assigned in the application, but find that the most of them relate merely to the manner in which the case was presented, and will not probably arise upon another trial. The fourth ground of error complains of the refusal of the court to give special instructions asked by the defendant. We think that the instructions were not in such form as to require the court to give them. Besides, in our opinion, the charge of the court fully presented the propositions indicated by the special charge, so far as they were justified by the law. For the error indicated, the judgments of the district court and court of civil appeals are reversed, and the cause is remanded.

NOTE.

Employees as Witnesses—Credibility.—In an action against a master for the negligence of his servants, the latter are competent

witnesses for the defendant. The relation of master and servant, and the incentive of the servants to exonerate themselves from blame, go to their credit, however, and the court may inform the jury of their right to consider these matters in that connection. Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Am. St. Rep. 914; Illinois Cent. R. Co. *v.* Haskins, 115 Ill. 300; Central R., etc., Co. *v.* Maltsby, 90 Ga. 630; Central R. Co. *v.* Mitchell, 63 Ga. 173; Bond *v.* Frost, 8 La. Ann. 297; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 483. *Contra*: In Marquette, etc., R. Co. *v.* Kirkwood, 45 Mich. 53, 40 Am. Rep. 453, the court said: "While there may appear on the trial, on direct or cross-examination, such bias or behavior as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury or suggest to them that any suspicion attaches to the testimony of agents or servants of a corporation, or individual, by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses."

LOUISVILLE SOUTHERN RY. CO. *et al.*

v.

TUCKER'S ADM'R.

(*Court of Appeals of Kentucky, Jan. 28, 1899.*)

Removal to Federal Court.—No removal can be had, as matter of right, from a state to a federal court, unless the sum sued for exceeds, exclusive of interest, the sum of $2,000.

Same—Receiverships.*—Every receiver appointed by a federal court may be sued in any state court having jurisdiction, in respect to any transaction of his in carrying on the business connected with the property, without the previous leave of the appointing court.

Death of Brakeman—Contributory Negligence.—Deceased was upon the pilot of the engine for the purpose of assisting in placing a car on a siding by a "running switch," by uncoupling the car at the proper time. He was ordered to stand on the pilot by the conductor and engineer; and his duty to so assist could not be performed in any other position. *Held*, that he was not guilty of contributory negligence in assuming such position.

Damages—Instructions.—Where the verdict was not excessive, an

*See note at end of case.

inaptly drawn instruction as to the measure of damages was not prejudicial.

Liability for Acts of Receiver.*—The acts of a receiver of a railroad, or those of his employees, are not chargeable to the railroad company.

Parties—Improper Joinder.—Where the proceedings show that the action was against the receiver, and the judgment is against both defendants, the fact that the company was improperly joined as defendant is no reason for a reversal as to the receiver.

APPEAL by defendants from Anderson county circuit court. *Reversed* as to the railroad company. *Affirmed* as to the other defendants.

Humphrey & Davie and *C. A. Hardin*, for appellants.
Bell & Bell and *W. G. Welch*, for appellee.

BURNAM, J. The personal representative of W. T. Tucker brings this action to recover the sum of $2,000 for the loss of the life of his intestate, alleging that the defendant the Louisville Southern Railway Company is a Kentucky corporation, and as such constructed and operated a line of railroad in this state; that in July, 1893, the railroad was put into the hands of the defendants Spencer and Fink, as receivers, by order of the United States circuit court for Kentucky in the action of the Central Trust Company of New York against the Louisville Southern Railway Company, and that they were, by their employees and agents, operating and carrying on the business of the railroad on the 30th day of August, 1894, and thereafter; that on that day his intestate was killed by the negligence and carelessness of defendants' employees in charge of their train, and in a higher grade of service than decedent, he being at the time subject to and obeying their orders. At the appearance term of the court, appellants Spencer and Fink filed a petition seeking to remove the cause from the state court to the circuit court of the United States. This petition recites that at the time of the accident they were acting as receivers of the Louisville Southern Railway under an appointment made by the United States circuit court in the case above mentioned, and had pos-

Case Stated.

*As to Liability of Company for Acts of Receiver, see Texas & P. Ry. Co. *v.* Manton (U. S.), 9 Am. & Eng. R. Cas., N. S., 850 and *note* p. 851 *et seq.*; Schurr *v.* Omaha & St. L. Ry. Co. (Iowa), 5 Am. & Eng. R. Cas., N. S., 152 and *note*, p. 155.

session of and were operating the road; that the Louisville Southern Railway Company was not liable or responsible for the injuries complained of; that, at the time of the institution of this suit and the making of the motion, they were citizens and residents of the state of New York, while the plaintiff was a citizen and resident of the state of Kentucky; that the suit was one which arose out of the conduct of the petitioners under their appointment as receivers, and was ancillary to the main action of the Central Trust Company of New York against the Louisville Southern Railway Company, which was pending in the United States circuit court for the district of Kentucky. They offered bond with security for their entering into the circuit court of the United States on the first day of its next session, and for costs that might be awarded by the circuit court of the United States if that court should hold that the case was wrongfully and improperly removed thereto, and prayed the state court to accept the bond and proceed no further in the cause. The state court refused to surrender jurisdiction, and this refusal of the state court is the first ground relied on for reversal. The defendants thereupon filed answer denying liability for the injury complained of, and pleading avoidance thereof, because of contributory negligence on the part of decedent. The case, being tried out, resulted in a verdict and judgment in favor of appellee for $2,000; and to reverse that judgment this appeal is prosecuted.

Plaintiff's intestate was a young man, 21 years old, unmarried, in good health, earning $50 per month as brakeman. He was killed on August 30, 1894, at Waddy Station, being at that time brakeman on a construction train which was working southwardly from Louisville. The engine attached to this train was placed, with its front end north, about the middle of the train, and there being some 11 or 12 cars on the end towards Louisville, and 8 or 9 cars on the other end. There was a side track at Waddy and the conductor in charge of the train wished to take out of the train an empty box car, which was next to the engine, towards Louisville, and place it on this siding. To do this, he cut off all the cars north of the engine, except the box car, which he intended to put on the side track; and the engine then pushed the cars on the opposite end of the train beyond the switch, and detached them, leaving them standing on the main track. The engine then pushed the empty box car north of the switch, the engine being between the car and the switch. In order to save time,

the conductor and engineer determined to place the car on the siding by what is known as a "running switch," which is made by having some one stand with his hand on the switch stand as the engine approaches the switch; the engine being uncoupled from the car just before reaching the switch, the engine being allowed to run onto the main track, and the switch being thrown immediately after the engine passes it, thus forcing the car onto the switch by the momentum acquired before it is uncoupled from the engine. In order to uncouple the engine at the proper time, deceased was compelled to take his place on the pilot of the engine. At the first attempt the car failed to run into the switch, for lack of momentum, and another attempt was determined on by the conductor and the engineer. When the engine moved down the track in order to get sufficient momentum to make the second trial, deceased continued to occupy his position on the pilot. As the engine and car approached the cars which had been left standing on the main track north of the switch, the engineer attempted to reverse his engine, but could not get the lever to go over. He then tried to stop by means of the air brake, but "the air wouldn't work good"; and as a consequence the empty car collided with the cars behind it with such violence as to drive the empty car back upon the engine, breaking the pilot bar and killing plaintiff's intestate.

The first question is, should the case have been removed on the petition of appellants, the amount involved being only $2,000? And it must be determined by the provisions of the United States statutes upon the subject of removal of actions. The act of congress of August 13, 1888 (Ky. St. p. 39), provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." The right to remove to a federal court from a state court is found in section 2 of that act, which reads as follows: "That any suit of a civil nature, at common law or in equity, arising under the constitution or laws of the United States, * * * of which the circuit courts of the United States are given original jurisdiction in the

preceding section, which may be now pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." And the facts to be stated in the petition for removal are found in section 3, by which it is provided "that if any action is commenced in a state court, and the matter in dispute exceeds the sum or value of $2,000.00, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court and make affidavit if the court require it, and be entitled to removal." We think these two sections, taken together, make it clear that no removal can be had, as a matter of right, from a state to a federal court, unless the sum sued for exceeds, exclusive of interest and costs, the sum of $2,000.

Removal to Federal Court.

But it is contended for appellants that the right of removal exists in this case because this suit is one which arises out of their conduct as receivers, and is ancillary to the action in which they were appointed, and which was pending in the circuit court of the United States at the time of the institution of this action, and cannot be maintained without the previous leave of the court appointing them. There can be no question that the contention of appellants on this point is the general doctrine, and has frequently received the approval of this court. See 2 Story, Eq. Jur. (2d Ed.) 883, and Hazelrigg v. Bronaugh, 78 Ky. 62. But this rule has been changed by section 3 of the act of congress of August 13, 1888, which provides "that every receiver or manager of any property appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." This question has been passed on by the supreme court of the United States in McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, and Railway Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, the court holding in the latter case that: "By section 3 of the act of March 3, 1887, as corrected by the act of August 13, 1888, every receiver appointed by a court of the United States may be sued, in respect to any transaction of

Same—Receiverships.

his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. Necessarily, such suit may be brought in any competent jurisdiction, and proceed to judgment accordingly. This suit was so brought." The question was discussed in the case of Central Trust Co. *v.* East Tennessee, V. & G. Ry. Co., 59 Fed. 523, the court holding that: "The permission given by the third section of the judiciary act of 1887—88 to sue receivers of federal courts, for acts or transgressions of theirs in carrying on the business connected with the property, without leave of the appointing court, is not restricted to the courts having jurisdiction of the receiver and the property, or to the federal courts generally, but extends to any court of competent jurisdiction; and the appointing court has no power to enjoin the bringing of such suits in any other than the federal courts." It seems to us that these decisions are conclusive on this contention of appellants.

It is also insisted that there is no evidence of any negligence on the part of the railroad employees in the facts connected with the death of plaintiff's intestate, but that, on the contrary, he was guilty of gross contributory negligence in assuming the position on the pilot when there was no occasion for him to be there, and that defendants were entitled to a peremptory instruction. The proof is conclusive that intestate took his position on the pilot of the engine by the direction of the conductor and engineer, and that the duty which he was called upon to discharge at that time could not have been performed by him from any other place; and it seems to us that it was necessary for him to be there while the engine was going down the track to a position from which to get the proper speed for the intended movement, as the engine would be in motion both going and returning, and he would have had no opportunity of getting into his position after the engine and car had started back towards the switch. The proof shows that both the conductor and engineer, who were employees superior in authority to decedent, knew that they were attempting a very dangerous feat,—one expressly prohibited by the rules of the company,—and that the accident resulted from the failure of the engineer to stop his engine before it struck the cars standing on the main track. Whether this failure was the result of negligence on the part of the engineer, or of some defect in the machinery

Death of Brakeman—Contributory Negligence.

controlling the engine, does not conclusively appear. But in either case decedent was not at fault.

It is also contended that the instruction upon the question of the measure of damages is erroneous and prejudicial to appellants. While it may be conceded that the instruction on this question is not aptly drawn, it does not appear to have been so misleading as to be prejudicial to appellants' rights. If plaintiff was entitled to recover at all, a judgment for $2,000 was certainly a very reasonable one.

Damages—Instructions.

Appellants contend that there should be a reversal as to both defendants because of the judgment against the Louisville Southern Company. There can be no doubt that the judgment against that company was erroneous, as the receiver of a railroad is the representative of the court, and not of the company, and the company is not liable for his acts or those of his employees. This doctrine is fully sustained in High, Rec. § 369, and by many adjudications both of the state and federal courts. But the contention that the judgment against the receivers must be reversed for this reason is untenable. There was no demurrer or motion to elect filed by appellants on this ground. The allegations of the petition show that no recovery could properly be had against the corporation, and the whole proceeding shows that it was an action against the receivers and not against the company; and it does not follow that the judgment is void against the real parties defendant. Section 373 of the Civil Code provides that, "though several defendants are summoned, judgment may be rendered against any of them if the plaintiff would have been entitled to judgment against them in an action against them alone." Undoubtedly the common law, in actions brought on a joint contract, is that judgment must be rendered against all or none. See Joyes *v.* Hamilton, 10 Bush, 544. But a different rule prevails in actions for tort or wrongful act. See Shelton *v.* Harlow, 15 B. Mon. 547; Buckles *v.* Lambert, 4 Metc. (Ky.) 334; and Loving *v.* Com. (Ky.) 45 S. W. 773. In such actions, where several persons are sued jointly, a joint verdict may be rendered, and new trial granted as to some of them, and the full amount of the judgment left standing against one, the liability of such defendants being both joint and several. For the reasons indicated, the judgment against the railroad cor-

Liability for Acts of Receiver.

Parties—Improper Joinder.

poration is reversed, and the judgment against the receivers, Spencer and Fink, is affirmed.

NOTE.

Leave to Sue Receiver Unnecessary under Act of Congress of 1887.—The third section of the judiciary act of March 3, 1887 (24 U. S. St. p. 554), authorizing suits to be brought against receivers of railroads, without special leave of court, was intended to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of obtaining service. Eddy *v.* Lafayette, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766; Dillingham *v.* Russell, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139; McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. Rep. 452.

The Act of Congress of March 3, 1887, § 3, providing that "every receiver or manager * * * appointed by any court of the United States may be sued in respect of any act of his * * * without the previous leave of the court"—*held*, to include acts of a former receiver. McNulta *v.* Lockridge, 141 U. S. 327, 12 Sup. Ct. Rep. 11.

And the above section, as corrected by the act of Aug. 13, 1888, ch. 866, authorizing suits against receivers without previous leave of court, is not limited by section 6 providing that "this act shall not affect the jurisdiction over or disposition of" pending suits. Texas & P. R. Co. *v.* Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

Where a federal court appoints a receiver for a railroad company which was created by act of congress, an action against receivers for personal injuries is one arising under the constitution and laws of the United States, and is only maintainable, without leave of court, by virtue of the above act of congress. Texas & P. R. Co. *v.* Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

It is the evident intent of such act of congress, that a plaintiff who has a strictly legal right of action and a claim for unliquidated damages enforceable against and payable out of property which is in the possession and under the control of a receiver appointed by a federal court, shall not be deprived of his action at law, and of the right of trial by jury. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. Rep. 452.

Where the action is brought in November, 1887, for an injury that occurred during the preceding September, against a receiver, he cannot question the right to sue him in a court other than the one in

which he was appointed. Southern Pac. R. Co. *v.* Maddox, 42 Am. & Eng. R. Cas. 528, 75 Tex. 300, 12 S. W. Rep. 815.

But leave should be obtained from the federal court when the suit appointing the receiver was commenced before the act was passed; and a judgment rendered against a receiver appointed before the passage of the act, without consent of the court, is not conclusive as against the receiver, but is subject to the equity jurisdiction of the court appointing him. Missouri Pac. R. Co. *v.* Texas Pac. R. Co., 42 Am. & Eng. R. Cas. 34, 41 Fed. Rep. 311.

ROGERS

v.

LOUISVILLE & N. R. CO.

(*Circuit Court, W. D. Tennessee, May 28, 1898.*)

Death of Brakeman—Foreign Cars—Cause of Injury—Burden of Proof.*—In an action for the death of a brakeman resulting from a fall from one of a long train of cars, it appeared that one of such cars was a defective foreign car, and that such defect might have caused the accident. *Held*, that the burden of proof was upon plaintiff to show, not only that deceased fell from such car, but that his fall was caused by such defect.

VERDICT directed for defendant.

Thomason & Thomason, for plaintiff.
Sweeney & Farobough, for defendant.

HAMMOND, J. (charging jury). Because the plaintiff has failed to show, by a preponderance of the proof in this case, that her son lost his life by the negligence alleged in the declaration, I am constrained to direct that your verdict should be for the defendant, and it will be entered accordingly.

Technically, this is all I need say to you, and we might end the case with that direction; but it is my great desire, and constantly my habit, whenever I take that course with a case, to justify, as far as I am able to do so, the action of the

*See Lake Shore & M. S. Ry. Co. *v.* Andrews (Ohio), *ante*, p. 545.

court, by giving to the gentlemen of the jury the reasons that actuate me in giving that direction, so that it may find approval in your own intelligence, if it can find approval at all.

The great trouble about all these cases is the human sympathy that demands and overwhelmingly suggests to everybody that where a man loses his life through such a calamity as came upon this plaintiff's son, and he was in the service of a railroad company, we should like to see her compensated for the loss in some way, by having a sum of money that will help take care of her, in the absence of the son upon whom she depended. But it would be utterly impossible to introduce into our law the practice that would make a railroad company an accident or a life insurance company, to pay all of its employees who are hurt and injured in its service a sum of money to compensate those who are dependent upon them. There is no such law as that, and it is the greatest injustice to the railroad companies to proceed upon the theory of compelling them to pay money to everybody who is injured in their service. They do not get any pay, like accident insurance companies. You had a trial of an instance of that before you,—that, where there is a life insurance policy, or an accident insurance policy, the company gets its regular premiums, which are adjusted according to the circumstances of the case, and according to the risk, which premiums are supposed to compensate that company for its promise to pay damages when an accident occurs or when his life terminates. The railroad companies do not receive any such premiums as that. They pay high wages, and good wages, for the services that men do for them, and they pay them, and must pay them, upon the theory that the man's wages compensates him for the risk that he takes; and every man who enters into the service of a railroad company agrees, when he goes into it,—as a matter of bargain and as a matter of contract, he agrees with the railroad company,—that he will take the ordinary risks that belong to the service into which he enters. There is not in the history of human affairs any more dangerous employment, scarcely, than that of a railroad brakeman. Perhaps there are some more hazardous employments, in the handling of dynamite, gun cotton, powder, and explosives of that kind, but, outside of that class of business, men do not engage in any business so hazardous, and with so many risks attendant to it, as that of a railroad brakeman,and all that risk he takes

when he goes into the service of the company; and statistics show that a very, very large per cent. of the men who go into it are sooner or later in some way injured or lose their lives.

Now, the railroad company, on its part, enters into a bargain that it will furnish to the men who work for it reasonably safe appliances, that are known to the business, for the purpose of their protection against the dangers that are involved in the service; and the law rigidly requires that every railroad company shall perform that obligation of its contract, and that it shall have its appliances for doing the work in a reasonably safe and proper condition; if the safety depends upon the structures and appliances, that the railroad shall have that which is reasonably safe. They are not required to have the best. You can sit down and calculate that, by the high art of mechanics, one structure would be safer than another. We are a great deal safer if we take an ocean greyhound to go across the Atlantic ocean than we would be were we to take a common, everyday tramp ship, but if we take the tramp ship we take the risks that attend the tramp ship. The company that runs the tramp steamer is not bound to furnish us all the safety that we find upon the ocean greyhound. And so it is with these railroads. They are not bound to furnish the best appliances that are known to the art of railroading to their employees. They have the right to furnish such as they are able to pay for, such as their business demands, and such as are in common use among railroad corporations in doing the transportation of the country, and that appliance which is ordinarily in use by them and considered safe is that which they have the right to supply; and, when a man goes into their service, he knows what kind of railroad company it is, what kind of appliances they have, and he knows what their ordinary method of doing business is, and he takes the risks that are incident to that service.

Now, we know, and it is in this record, that in making up these freight trains, for passing over the railroad, in what we call the "freight transportation department," the company may use cars that are furnished with air brakes, and when they use those cars, and have a train made up of cars that are using the ordinary air brake, the brakemen probably do not have to walk over the cars, and that danger is eliminated from that kind of a train, and it is a great deal safer than one where the brakeman has to walk about and over the train,

and turn the crank or the wheel that sets the brakes on the freight cars. But we also know, as a matter of history,—the history of our country,—that the railroad companies do not all of them have their cars furnished with air brakes. They may not all be able to pay for them; at least, they all have not got them. We have a law, of course, that requires them now to use that kind of brake, and the interstate commerce commission has given them two years longer in which to equip their service with that kind of less dangerous and more useful brake, and also to put in a less dangerous coupling; but until that law takes effect and the dangers incident to the service are lessened by obedience to the law of having the air brakes, and having the patent couplers, the brakemen, when they are in the service, take the risk of such appliances as they have.

And we know that, in the common everyday transportation of railroads and interchange of traffic with each other, they congregate together, in a train, cars that are not uniform in their construction, and they are not uniform in the appliances that they have for the protection and safety of the brakemen. Whatever danger there is in this want of uniformity the brakeman takes. He knows, when he goes into the service of the Louisville & Nashville Railroad Company, or any other railroad company in this country, no matter where it is located, that it is utterly impossible to provide a perfectly uniform train, with reference to its appliances and to the heights of the cars, and those things that would go to minimize and lessen the dangers, and therefore, when he goes into the service, he takes the risks of any inequalities that there may be about the train.

But, taking all that into consideration, there is nothing better settled in our law—because it is settled by a decision of the supreme court of the United States—than that, whenever a railroad company receives from another company a railroad car to be transported on its own line, it owes a duty to its railroad hands that they shall see that that car is reasonably safe for the service into which they are to put it. They are bound to inspect it, not only for the purpose of seeing to it that the wheels are all right and whether the brakes are all right, but they are bound to inspect it all over and everywhere, and see whether it is properly constructed, and properly adapted to the uses to which they are about to put it, and if they do not make that kind of an inspection they are guilty of negligence. If they do make that kind

of an inspection, and they accept and put into the service a deficient and defective car, which is not reasonably safe, they are negligent; and I would submit it to you, as a question for your determination in this case, whether or not it was not an act of negligence on the part of the Louisville & Nashville Railroad Company to put in its train on this occasion a car which had a roof that was oval or cylindrical in its construction, and from 14 to 30 inches higher than the ordinary cars that they used in their freight trains, and without that car with the oval roof having on it the ordinary footrun for the safety of the brakeman. which we find on the ordinary freight cars. They might have put a temporary footrun upon it, or they might have rejected it and declined it entirely; but I have not any doubt, if you found, from the facts in this case, that this car was that kind of a car, and it had no footrun upon it, and they took it in that way, it would be an act of negligence, and I would so say to you, if I had any occasion to submit that question to you.

But the difficulty which the plaintiff has in this case is this: That the law requires every plaintiff to show, as I told you before,—not beyond a reasonable doubt, but by a preponderance of the testimony,—that the injury occurred through the particular negligence which is alleged against the railroad company. It is not sufficient to show that the railroad company was negligent, and the plaintiff has not entitled herself to a verdict when she shows that this railroad company was negligent in taking this car into its freight train without a footboard for the brakeman to walk over. She must go further than that, and show that it was by that specific act of negligence that the man was killed.

Now, what proof is there in this record that that was so? Is it not necessary, and certainly it would be unreasonable, to demand that when these trains are worked in the night, and when the accident occurs, as this did, about daylight in the morning, the plaintiff should be required to bring forward here some eyewitness that saw him fall off the top of that car that did not have the footboard on it. No such unreasonable demand as that could be made upon the plaintiff. But it is her duty to show, by whatever proof is at hand,—if she has not got eyewitnesses, there must be circumstances or conditions that exist in the case from which you can see that it is a fair and reasonable inference upon a preponderance of the

testimony,—that her son's life was lost by reason of that particular defect that was in the train.

If that kind of condition and that kind of circumstance are not found in the physical facts and in the proof, it is the plaintiff's misfortune. The law presumes everything in favor of the defendant until the plaintiff has proved the case by the preponderance of the testimony. You cannot charge negligence against a defendant upon mere inferences that are unfounded from the facts and circumstances of the case. Negligence must be proved in every case by either the positive testimony of witnesses who saw and can testify as to the facts in dispute, or by facts and circumstances—what we ordinarily call "circumstantial evidence"—that are reasonably conclusive of that fact.

This young man fell off the train not far from Bells, beyond all question, and was killed, but the proof here is that there were 12 or 14 cars in the train. We know, as well as we can know anything, that it is an easy thing for a man to have fallen off of any one of those 14 cars. He might have fallen between any of the 14 cars that were on the train. He certainly might have fallen between any one of them that were in and about the middle part of the train, where it was his business to work. This car was in the rear part of the train,—the second car in front of the caboose,—and it is true that he had to pass over this unprotected roof in order to get to his place of working; but it does not follow, because he had to pass over it, that his foot slipped for want of a footboard on that car. It might have slipped after he had walked entirely across the train. It might have slipped as he went from one of those cars to the other. He might have gone entirely across that train, to a place on the other end, and been turning a brake in some other place, and have fallen off. It is not at all a reasonable inference to say, from the simple fact that there was a defective car in this train, that this man lost his life because of that defect, without any other fact to point to it as the place where he did slip off.

I have been very carefully listening to Col. Thomason's argument, and have been looking and searching through all the facts of this case to see if there was a single circumstance to lead to the fact that this man slipped off of this particular car any more than any other car, or that he might have fallen between this car any more than he might have fallen between any other car,—but it was apparent that he fell in between some car, as the wheels crushed him, but it is impossible to

identify the particular car that did run over him, because his coat sleeves protected or kept the wheels from being spattered up with the blood,—but I have been unable to find a single fact or a single circumstance that would point reasonably or unreasonably, to an inference that this man fell off of this defective car, or fell between this defective car, and the one next to it (for that was the way he was hurt unquestionably), any more than that he fell between any other two cars in that train; and, in the absence of such a fact or of such a circumstance, it is a pure assumption to say that he was hurt by falling in between the defective car and the one next to it. The fact that it was defective does not prove that fact. It might have been that he lost his footing in some other way, and there are so many other ways in which he might have done it that it is not reasonable to say that he lost it by that particular car simply because that particular car happened to be on this train; and for that reason I do not submit this question of the negligence of the company to your judgment, and do not submit the question of his falling off the train to you, because the plaintiff has wholly failed, in my judgment, to show by a preponderance of the testimony that her son's life was lost by reason of the defect which had been proved against this railroad company on this train, if you should come to the conclusion that it was such a defect as that.

The only matter that has troubled my judgment about it has been whether or not I should leave it to the jury to say, from the existence of the defect itself, that it was the cause of the accident; but I have come to the conclusion that, in the absence of any other fact or any other circumstance to show that it was lost by the defective car, it is my duty, instead of submitting it to you, to say to you there is no proof in this record that the plaintiff lost his life by the alleged negligence in the declaration, and for that reason I have directed your verdict, and let it be so recorded.

DELAWARE, L. & W. R. CO.

v.

VOSS.

(*Supreme Court of New Jersey, Sept. 22, 1898.*)

Liability of Master for Failure to Make and Enforce Rules.*—A railroad company, in the operation of its railroad and freight and coal yards, is not bound to make, establish, and enforce rules and regulations to protect its servants and employees from the risk of danger incident to the employment, or from those risks which are obvious, or risk of danger arising from the negligence of co-servants in the same common employment, nor from the risk of danger to be incurred by reason of the want of ordinary care on the part of the servant in his employment.

Same—Negligence—Pleading.—The general averment in a count in a declaration of the negligence of the railroad company to make and enforce reasonable and proper rules and regulations for the guidance of its employees in its business, or in the operation of its railroad yards, is not a sufficient averment of an element of negligence upon which an action for personal injuries by the servant against the company can be based.

(Syllabus by the Court.)

ARGUED February term, 1898, before LIPPINCOTT, GUMMERE, and LUDLOW, JJ.

Joseph A. McCreery, for plaintiff.
J. Flavel McGee, for defendant.

LIPPINCOTT, J. In this case separate demurrers are filed to the first and third counts of the declaration. The action is one by the plaintiff to recover damages of the defendant for personal injuries inflicted while the plaintiff was in the employment of the defendant in its freight coal yard at the terminus of its railroad at the Hudson river, in Jersey City. The first count of the declaration avers that at the terminus of this railroad the railroad company had a coal yard appurtenant to the railroad, and used in connection with the distribution of coal carried by the railroad company to the vari-

Liability of Master for Failure to Make and Enforce Rules.

*See note at end of case.

ous points of unloading, by means of tracks laid in the said yard, over which the cars carrying coal were transferred. It avers that in January, 1896, the plaintiff was a servant of the defendant in this yard, and that it was a part of his work or duty to go upon the coal cars standing in said yard, and get coal to be used in the said business of operating its railroad. One averment of negligence in this count is that the defendant suffered and permitted, in the operation of its yard, "its cars to be kicked with great force and violence across this yard; that is to say, to be driven across by giving them an impetus and detaching them." So far as this averment, standing alone, is concerned, the impetus and the detachment of the cars was the manner in which the work of the yard was done by the co-employees or co-servants of the plaintiff in the employment of the defendant, whose negligence in this respect, even if it be conceded to exist, would not form a basis for an action for injuries arising by reason of such negligence. The negligence of a co-servant is a risk assumed in the common employment. But the count of the declaration obtains its force from the further averment of negligence of the defendant in operating its roads, which is couched in these words, to wit, "and of its negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employees in the operation of its said yard," and again charging it with "negligence and carelessness in failing to make and enforce reasonable and proper rules and regulations for the guidance of its employees in its said business." The declaration further avers that cars were permitted or suffered to be drawn with great violence across the yard, and against the car from which the plaintiff was obtaining coal, thereby causing him to be thrown from the car, and sustaining injury. There is no averment whatever setting forth in what respect the failure to make reasonable rules and proper regulations was the cause of the injury to the plaintiff. Even if such averment had been contained in this count of the declaration, still it is clear that in the work of the operation of this yard, and the business carried on therein, the plaintiff assumed all the risks of the negligence of his co-servants, as incidental to this class of employment, and therefore the gravamen of the count is in so far as the liability of the defendant is concerned, is in the averment that the company failed to establish certain general rules for the guidance of its employees or servants in their relations to each other in the work being carried on in

this yard. This count of the declaration is framed upon the general idea that it was the duty of the defendant, as master, to make and enforce rules and regulations for the operation of its yard. I think it is sufficient to say that in the law no such legal duty existed upon the part of the defendant. Risks which are incidental to the employment, risks which are obvious, and those arising from the negligence of co-servants, and those created by the want of reasonable care in the exercise by the servant of his employment, are all assumed by the servant when he enters or continues in the service; and there cannot, in reason, be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks. The general averment of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition, and it cannot be founded upon any sound reasoning. The cases to which reference has been made in support of this count are cases in which is declared the duty of the master to exercise the legal degree of care to provide a safe place for the servant to do his work, or provide safe appliances with which to perform it, and that the master is answerable for default in these respects, and that the default may exist in the system provided for the servant to work by, or in the particular method by which the work is done, and can have no application whatever to the case in hand. There is a class of cases which hold that, if rules and regulations are made, they must be of such a character as will afford reasonable protection from incidental or obvious dangers, and if they are unreasonable, and obedience to them causes injury to the servant, a liability arises upon the part of the master; but there is no principle of law compelling the establishment of rules by which the work of the master shall be done by the servant. The great danger to the master would be the establishment of rules and regulations for the conduct of his business, the operation of which might result in risks not contemplated by the parties, and involve serious discussion as to their reasonableness. The master is not bound to make any such rules, but is entitled to have his liability to his servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relation of master and servant to each particular cause or case of injury as it arises, and to the

Same—Negligence—Pleading.

system or manner in which his business is operated or conducted. Neither do the cases in which the question of the duty of the master towards an ignorant or inexperienced workman entering upon a dangerous employment is discussed have any place in the determination of the questions presented by this court. The demurrer to the first count of the declaration is sustained, with costs.

The third count of the declaration appears to present a good cause of action. It is averred in this count, in apt and appropriate language, that the defendant failed to exercise reasonable care in selecting co-servants with the plaintiff, and knowingly employed incompetent, careless, and inefficient co-servants, and that, as such, they negligently and carelessly performed their duty in this employment, whereby the injuries arose to the plaintiff. The averments in this count clearly and sufficiently set fourth this element of negligence, and the results thereof to the plaintiff. The demurrer to the third count therefore will be overruled, with costs.

NOTE.

Master and Servant—Rules.—It is the duty of a railroad company to make and announce rules for the protection of its employees. Abel *v.* Delaware & H. Canal Co., 28 Am. & Eng. R. Cas. 497, 103 N. Y. 581, 9 N. E. Rep. 325, 4 N. Y. S. R. 269, 57 Am. Rep. 773; Louisville & N. R. Co. *v.* Orr, 91 Ala. 548, 8 So. Rep. 360; Cooper *v.* Central R. Co., 44 Iowa 134; Judkins *v.* Maine C. R. Co., 80 Me. 417, 6 N. Eng. Rep. 715, 14 Atl. Rep. 735; Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. Rep. 38; Bushby *v.* New York, L. E. & W. R. Co., 107 N. Y. 374, 14 N. E. Rep. 407, 10 Cent. Rep. 240, 12 N. Y. S. R. 9; affirming 37 Hun 104; Corcoran *v.* Delaware, L. & W. R. Co., 4 Silv. App. 483, 38 N. Y. S. R. 251; Hartvig *v.* Northern Pac. Lumber Co., 19 Oreg. 522, 25 Pac. Rep. 358; Forey *v.* Syracuse, B. & N. Y. R. Co., 12 N. Y. S. R. 198, 46 Hun 678, *mem.*; affirmed in 122 N. Y. 667, *mem.*, 34 N. Y. S. R. 1015; Wild *v.* Oregon S. L. & U. N. R. Co., 21 Oreg. 159, 27 Pac. Rep. 954; Texas & P. R. Co. *v.* French, (Tex. Civ. App.) 22 S. W. Rep. 866; Madden *v.* Chesapeake & O. R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

MISSOURI, K. & T. RY. CO.

v.

JOHNSON.

(*Supreme Court of Texas, Dec. 22, 1898.*)

Injury to Engineer—Asleep on Duty—Evidence of Habits.*—In an action for injuries to an engineer, caused by a collision, claimed to have resulted from plaintiff's failure to keep a lookout, there was evidence tending to show that plaintiff's failure to see the other train was due to the fact that he was engaged at the time in the discharge of other duties. *Held*, that evidence to show that plaintiff was in the habit of going to sleep while running his engine was inadmissible, the rule in such cases being that when the question is whether or not a person has been negligent in doing, or in failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion.

ERROR by defendant to court of civil appeals of Fifth supreme judicial district. *Affirmed.*

T. S. Miller and *Head, Dillard & Muse*, for plaintiff in error.

Wolfe & Hare and *C. B. Randell*, for defendant in error.

GAINES, C. J. The defendant in error brought this suit against the plaintiff in error and the Missouri, Kansas & Texas Railway Company of Texas to recover damages for personal injuries claimed to have resulted from the negligence of the servants of the defendants. There was a judgment in favor of the defendant in error against the plaintiff in error, but not against its co-defendant. The plaintiff in error appealed to the court of civil appeals, where the judgment was affirmed.

The substance of the pleadings is thus stated in the opinion of the court of civil appeals: "Omitting formal allegations, the amended petition stated that the point where the collision

*See note at end of case.

occurred was on a very steep grade, over which it was impossible to draw heavy freight trains, and that, for the purpose of transporting cars over said hill, the defendant had established a switch, called 'Warner,' between Red River and Denison, where cars were set out of south-bound freight trains, if the train was too heavy to be pulled over the hill, or, in the event such cars were not so set out of such character of trains, then defendant would have an engine, called a 'helper,' to assist in pulling over the hill. It was also alleged that if Warner switch was full of cars, and no helper was to be there, then that the conductors of south-bound trains would be notified of such fact, and the cars would be set out at Colbert, a station further north on the line of appellant. The allegations of negligence are quite voluminous, as set forth in the petition, but they are, substantially, that the freight train was too heavy to be pulled over Denison hill, that not a number of cars sufficient to lighten the train were set out at Warner, that there was no helper to assist the train over the hill, and that the employees of defendant in charge of the train were not notified to set out cars at Colbert. Then it was alleged that the employees in charge of the freight train negligently failed to flag the passenger train following it. On February 15, 1894, the defendant filed its first amended original answer, which consisted of a general denial, and special plea to the effect that due and proper signals were given; that the injury to plaintiff was caused by the negligence of his fellow servants and by his own negligence. It is further alleged in said answer that plaintiff was furnished with a copy of rules and regulations for running trains, and that it was his duty to familiarize himself therewith; that he failed to do this, and failed to obey such rules, and that thereby his injuries resulted. Defendant also, in such answer, sought to recover of plaintiff damages for the destruction of property caused by said collision."

In passing upon the application for the writ of error, we were of opinion that no error was pointed out by the petition, except by the seventh assignment. We are still of the same opinion as to all other specifications of error, and shall, therefore, confine our discussion of the case to the ground of error specifically mentioned.

The defendant in error (the plaintiff below) was the engineer on a passenger train of the railroad company, and the accident occurred by reason of a collision of that train with

one of the regular freight trains of the company. The latter had reached a part of the road where there was a heavy up grade, and, being unable to surmount it at an ordinary rate of speed, was making very slow progress, if it had not come to a stop. While in this condition the passenger train overtook and ran into it. It was about 4 o'clock in the morning. There was evidence tending to show that there were signal lights upon the rear of the front train, and that a brakeman was sent back with a lantern to signal the passenger train, and also that the conductor dismounted with a lantern for the same purpose. There was also evidence tending to show that the passenger train ran by without paying any attention to the signals. On the other hand, the plaintiff himself testified that immediately before the accident an injector upon his engine was out of order, and that he was engaged in repairing it. The fireman on that train testified to the same fact, and also that at the same time he was employed in shoveling coal. During the progress of the trial, counsel for the defendants offered to prove by the fireman and others, in effect, that the plaintiff was in the habit of going to sleep while running his engine, and that while in that condition he sometimes ran past stations at which he ought to have stopped. The testimony, upon objection, was excluded, and the propriety of the court's action in that particular is the question presented by the assignment of error under consideration. We think the rule is well settled that when the question is whether or not a person has been negligent in doing, or in failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion. Railway Co. *v.* Converse, 139 U. S. 469, 11 Sup. Ct. 569; Tenny *v.* Tuttle, 1 Allen, 185; Glass *v.* Railroad Co., 94 Ala. 581, 10 South. 215; Guggenheim *v.* Railway Co., 66 Mich. 150, 33 N. W. 161; Warner *v.* Railroad Co., 44 N. Y. 465; Railway Co. *v.* Colvin (Pa. Sup.) 12 Atl. 337; Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Railroad Co. *v.* Kendrick, 40 Miss. 374; Chase *v.* Railroad Co., 77 Me. 62; Hays *v.* Millar, 77 Pa. St. 238; Gahagan *v.* Railroad Co., 1 Allen, 187; Railway Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113; Towle *v.* Improvement Co. (Cal.) 33 Pac. 207; Building Co. *v.* Klein (Colo. App.) 38 Pac. 608. In Tenney *v.* Tuttle, above cited, the court say: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that

act or omission, and not by the character for care and caution that the defendant may sustain." The principle has been frequently recognized, and sometimes applied, in this court. Railway Co. *v.* Evansich, 61 Tex. 3; Railway Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501; Railway Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96; Cunningham *v.* Railway Co., 88 Tex. 534, 31 S. W. 629. There may be some modifications of the rule, as applied to particular cases. One of these was acted upon in the case of Cunningham *v.* Railway Co., above cited. There the question was as to the competency of one Rownie as an inspector of car wheels, and as to his negligence in failing to inspect a wheel; and there was testimony to show that there was an old crack in it, which, upon careful inspection, could have been discovered. Rownie had testified, in effect, that he knew that he had inspected it on the day in question, because it was his habit to inspect that car every day that it was in Llano. Evidence was offered to show that on several days shortly after the accident he had failed to make an inspection. It was held that the evidence should have been admitted. In the opinion the court say: "If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident; and this is particularly true, since his testimony disclosed that one of his reasons for knowing that he inspected the wheel was the fact that he invariably performed that duty before the car left Llano. Thus, it seems that frequent failures to perform this duty at different times would be competent evidence, tending to prove his mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident." The principle, as applicable to this class of cases generally, is that when the habit of care or of negligence, as the case may be, has no connection with the specific facts in evidence bearing upon the question of care, evidence of such care or habit is without sufficient probative force to effect the determination of the question. In the present case the evidence that the passenger train ran by without paying any regard to the signals did tend to show that they were not seen. But at the same time it was consistent with the theory that the plaintiff was not asleep. The testimony on his own behalf, on the other hand, tended to show that the cause of the signals not being discovered was that both the engineer and

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the fireman were engaged in the performance of other duties, and were therefore not on the lookout. The evidence as to the cause of the accident and the conduct of the servants of the company in charge of the respective trains was direct, and, under the circumstances, proof that the engineer had slept while running his trains on other occasions was calculated to mislead the jury, and not to enlighten them. Under no rule, as we think, was it admissible. It follows that in our opinion we were in error in granting the writ of error, and therefore the judgment of the court of civil appeals and that of the district court are affirmed.

NOTE.

Evidence as to Customary Care or Negligence of Employees.—See Harriman *v.* Pullman Palace-Car Co. (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 277 and *note*.

Evidence of general reputation is admissible to prove the unfitness of a servant. And ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. Davis *v.* Detroit & Mil. R. Co., 20 Mich. 105; Illinois C. R. Co. *v.* Morrissey, 45 Ill. App. 127; Grube *v.* Mo. Pac. R. Co., 41 Am. & Eng. R. Cas. 357, 98 Mo. 330; East Line & R. R. R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. Rep. 99; Texas C. R. Co. *v.* Rowland, 3 Tex. Civ. App. 158, 22 S. W. Rep. 134. See also Gilman *v.* Eastern R. Co., 13 Allen (Mass.), 433; Hatt *v.* Nay, 144 Mass. 186.

In Frazier *v.* Penna. R. Co., 38 Pa. St. 105, the court refused to permit the introduction of specific acts of negligence on the part of a servant alleged to be incompetent, for the purpose of charging the defendant company with knowledge of the servant's incompetence. See also Hatt *v.* Nay, 144 Mass. 186; *contra*, Pittsburgh, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294.

A single act of casual neglect, in one who has previously shown himself to be competent, careful, and trustworthy, and who has acquired a reputation therefor, does not, *per se*, tend to prove him careless, imprudent, or unfitted for a position requiring care and prudence, or render the corporation liable for retaining him in such position. Baulec *v.* New York & H. R. Co., 59 N. Y. 356, 48 How. Pr. 399, 7 Am. Ry. Rep. 114; *affirming* 62 Barb. 623; Buckley *v.* Gould & C. Silver Min. Co., 8 Sawy. (U. S.) 394, 14 Fed. Rep. 833; Holland *v.* Southern Pac. Co., 100 Cal. 240; Sullivan *v.* New York,

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N. H. & H. R. Co., 62 Conn. 209, 25 Atl. Rep. 711; Cook *v.* St. Louis, I. M. & S. R. Co., 8 Mo. App. 573; Hansen *v.* New York & B. Bridge, 9 N. Y. S. R. 726, 45 Hun 590; Dallas City R. Co. *v.* Beeman, 74 Tex. 291, 11 S. W. Rep. 1102.

Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act. McDermott *v.* Hannibal & St. J. R. Co., 28 Am. & Eng. R. Cas. 528, 87 Mo. 285.

When it is sought to charge an employer by reason of his having knowingly employed an incompetent servant, such incompetency must be shown by general reputation, and not by specific acts. East Line & R. R. R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. Rep. 501.

The bringing of two railroad trains into collision is such a negligent act that evidence of that act alone will suffice to show the incompetency of the conductor who caused it. Evansville & T. H. R. Co. *v.* Guyton, 33 Am. & Eng. R. Cas. 311, 115 Ind. 450, 14 West. Rep. 301, 17 N. E. Rep. 101.

While evidence of single acts may be admissible to prove the incompetence of a servant, such evidence is not necessarily conclusive. Lee *v.* Detroit Bridge & Iron Works, 62 Mo. 565; Cooper *v.* Milwaukee & P. C. R. Co., 23 Wis. 668; Couch *v.* Watson Coal Co., 46 Ia. 17.

The habitual intemperance of the conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom. Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293.

Evidence that a railroad employee was hasty, passionate, and excitable does not of itself necessarily show that he is unfit for the post of yard master; nor does the mere fact that he had sent an engine upon the track when a coming train was overdue conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. Michigan C. R. Co. *v.* Gilbert, 2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243.

It is believed that Baulec *v.* New York & H. R. Co., 59 N. Y. 356, contains a statement of the correct rule: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employees whose acts and omissions of duty are the subject of investigation have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the

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case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry. Where character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described; and the actual qualities, the true characteristics, of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more would he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm. . . . An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment, and proved either incompetent, or careless and not trustworthy, by a single mistake or act of forgetfulness, and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case, as to all employees of corporations, until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service, as when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might

from inattention omit to sound the whistle or ring the bell at a road-crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. Murphy *v.* Pollock, 15 Irish C. L. 224. But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care would dictate; and if such care and caution were exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and reasonable exercise of discretion and judgment are all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

In a suit for damages for personal injuries brought by a brakeman against a railroad company, in which the unskilfulness and incompetency of the engineer were charged as causes of the injury, evidence of the declarations of the engineer to the plaintiff to the effect that he would as soon run over him as not, was held admissible to prove that the company did not use proper care in selecting the engineer, if supported by other satisfactory evidence. Houston & T. C. R. Co. *v.* Willie, 43 Tex. 318, 5 Am. & Eng. R. Cas. 551.

Evidence that an engineer alleged to have been incompetent was discharged after the accident for which damages are sought occurred, and that he has since been guilty of similar acts of negligence, is not admissible to prove that the employer was guilty of negligence in employing him. Couch *v.* Watson Coal Co., 46 Ia. 17.

GALVESTON, H. & S. A. RY. CO.

v.

DAVIS.

(*Supreme Court of Texas, Dec. 22, 1898.*)

Master and Servant—Negligence of Employee—Evidence.*—In an action for the death of an employee, predicated in part upon the carelessness and incompetency of defendant's conductor, evidence tending to show that the conductor was a drinking man was not admissible, there being no evidence that he was drunk at the time of the accident; and the fact that by a rule of the company drinking on the part of its employees was forbidden was immaterial in this connection.

Habitual Negligence—Evidence.—Evidence of a single act of negligence on the part of a railroad employee is incompetent to prove that he was habitually negligent.

Same—Same.—The testimony of an experienced trainman, although not an engineer, is admissible to show facts from which a jury may infer that an engineer was either incompetent, or habitually reckless in running trains.

ERROR by defendant to court of civil appeals of Fourth supreme judicial district. *Reversed.*

Upson, Bergstrom & Newton, for plaintiff in error.
Ogden & Terrell, for defendant in error.

GAINES, C. J. The assignment upon which we granted the writ of error in this case presents a very like question to that discussed in the case of Railway Co. *v.* Johnson (this day decided by us) 48 S. W. 568. We briefly state the case, and only in so far as it bears upon the questions we propose to consider: The son of the plaintiff, William Davis, was employed as a brakeman on one of the trains on defendant's road, and, while so employed, the train upon which he was engaged was run into by another train on the road, and he was killed. The action was brought by his father to recover damages for his death. The case was

Case Stated.

*See Missouri, K. & T. Ry. Co. *v.* Johnson (Tex.), *ante* and *note*.

predicated in part, at least, upon the carelessness and incompetency of the conductor and engineer of the colliding train, and the negligence of the company in employing them and retaining them in its service. The name of the conductor was Sam Greene. As bearing upon his competency, a witness was permitted, over the objection of defendant's counsel, to testify as follows: That, "Sam Greene was a drinking man," and also that witness "was the brother-in-law of Sam Greene, the conductor, Greene having married his sister; that Greene was a drinking man; that he would get drunk every time he got the money; that he was a drinking man, and drank to excess; that he never heard Greene's reputation as to his railroad qualities discussed; that he had the reputation of being a lazy, drinking man; that he sold him the liquor with which he got drunk." There was no evidence that the conductor was drunk at the time of the accident, and that he had ever been drunk while upon duty; and we think, under the rule announced in the case of Johnson *v.* Railway Co., above cited, the testimony objected to was clearly inadmissible. A man may be in the habit of getting drunk, and may abstain altogether while engaged in business. In such a case the proof of his habit would throw no light upon his competency or care while so engaged. A similar question was before the supreme court of Michigan in Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130. The court state the point, and dispose of it, in the following language:

Master and Servant—Negligence of Employee—Evidence.

"Plaintiff was asked on cross-examination if he had been drinking that evening, and he replied that he had taken one glass of beer. Defendant introduced a witness, and asked him what he could say as to plaintiff's being a drinking man,—whether he was addicted to the use of liquors. This testimony was properly excluded. The question is, what was plaintiff's condition as to sobriety at the time of the accident? It cannot be assumed that a drinking man, or one addicted to the use of liquors, is always drunk, or always in a condition which excludes the possibility of the exercise of due care." See, also, Heland *v.* City of Lowell, 3 Allen, 407; McCarty *v.* Leary, 118 Mass. 510.

Nor, in our opinion, did the fact that a rule of the company provided that "the use of intoxicating liquors is strictly forbidden," and declared that "total abstinence is necessary to safety in operating the road," make a difference in the case. It is clear that occasional use of intoxicating liquors while

not on duty would not effect the competency of an employee. The rule was doubtless adopted out of abundance of caution, and should not be invoked to show negligence on part of the company. The same may be said of the testimony of an officer of the company to the effect that, if it had been known that Greene was in the habit of drinking to excess, he would not have been employed, and that, if he was an habitual drunkard, he had no business on the train. If an habitual drunkard, under the rule of the company he was improperly employed, but it does not follow that from his habit he was necessarily reckless or incompetent.

In course of the trial a witness was permitted to testify: "I left San Antonio, with Sam Greene as my hind brakeman, either in the fall of 1884 or the spring of 1885. Ran from here to Harwood, and then from Harwood to Gonzales. I pushed the train down from Harwood forward of the engine. We loaded some stock, and then pushed down to the depot to get our orders and waybills. Greene and I and the other brakeman went up to the engine, and, while we were standing there, Greene suggested setting the switch off the main track, on which we were standing, onto the side track, and let George H's train in, as he was almost due from Harwood. I said: 'No; you hang the red light on the hind end of the engine, and leave the switch where it is; and, if he wants to throw the switch, he can do it himself.' I then proposed that we go to supper, and paid no attention to Greene. Sullivan, the fireman, and I went to the boarding house to get something to eat. Then we went up to the office, and found a telegram for me to go on, so I got my orders; and by that time it was after dark, and when we came out I supposed that everything was all right and just as I had ordered it, but I asked Greene in particular, as I stepped in the caboose to get my lamp: 'Greene, is everything all right?' He said: 'Yes.' Then I stepped out, and gave the signal to start. We ran off the track at the switch, which was found to be open. Greene acknowledged to have done it. It took me several hours to push the cars back, and give my engine a chance to work, and get her on the track. This was the first case that I saw of his recklessness, carelessness, and disobedience." It is well settled that the character of carelessness of a person cannot be proved by a single act of negligence. "The reason is that special acts very often exhibit frailties or vices that are contrary to the character which actually exists, since the very frailties

Habitual Negligence—Evidence.

proven against a man may have been subsequently regarded by him in so serious a light as to have produced an amendment of his character in the given particular. Besides, ordinary care does not exclude occasional acts of carelessness, such as all men are liable to commit." 2 Thomp. Neg. 1054, citing Frazier *v.* Railway Co., 38 Pa. St. 104. If there had been competent evidence that Greene was a careless employee, then, in our opinion, the testimony would have been admissible to show that the company was chargeable with knowledge of his character in that respect. See opinion of JUDGE FLY on former appeal in this case, 23 S. W. 305. But it seems to us that there was an absence of competent proof that prior to the accident Greene was a careless conductor, and that, therefore, the evidence ought to have been excluded.

It is also assigned that there was error in permitting a witness to testify as follows in regard to Henry, the engineer in charge of the train at the time of the accident: "I knew Thomas Henry when he was employed on the road as a fireman, and afterwards when he ran an engine. He pulled my train very often. The conductor is in charge of the train. The crew usually consists of an engineer, fireman, two brakemen, and a conductor. He differed in a good many respects from an ordinary, competent engineer. He had no more idea of speed than a three year old boy. He would pull a train down hill just as fast as he could turn a wheel. I know that he would do this, because he did it every time he pulled my train. I am not an engineer, and never ran an engine." The case was predicated in part upon the negligence of the company in employing and keeping in its employment, as an engineer, Henry, who was alleged to be negligent and incompetent, and whose negligence was alleged to have caused the death of the plaintiff's son. We think that upon the issue of his general negligence and incompetence the evidence was admissible. The testimony of the witness showed that he was an experienced railroad man, and that Henry had frequently operated trains of which he was conductor. Though not an engineer himself, he was, in our opinion, competent to judge whether a train was or was not properly operated by the engineer in charge. He states the facts, from which a jury might infer that the engineer in question was incompetent or habitually reckless. The testimony is not as to a single act of negligence, but as to a habitual course of negligent conduct during the time in which he was employed as an

Same—Same.

engineer for the company. Gahagan *v.* Railway Co., 1 Allen, 187; Railway Co. *v.* Ruby, 38 Ind. 294.

The other assignments presented in the court of civil appeals were correctly disposed of by that court. For the errors pointed out in this opinion, the judgment of the court of civil appeals and that of the district court are reversed, and the cause remanded for a new trial.

DENMAN, J., did not sit.

MORROW

v.

ST. PAUL CITY RY. CO.

(*Supreme Court of Minnesota, Dec. 7, 1898.*)

Injury to Employee—Incompetency of Fellow Servant—Evidence and Verdict.*—A verdict finding that a fellow servant was incompetent, and that the master knew, or in the exercise of reasonable care should have known, that fact, *held* sustained by the evidence.

Special Verdicts.—Under section 5380, Gen. St. 1894, it is discretionary with the judge to permit or refuse to permit the jury to return a special verdict in an action for the recovery of money or specific real property.

Evidence.—Evidence of certain acts done in one part of the work *held* competent, as tending to show that said fellow servant did not have sufficient judgment and presence of mind to be competent for the other part of the work in which he was employed.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court. *Affirmed.*

Munn & Thygeson, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

CANTY, J. This is the third appeal in this action. See 65

*See Missouri, K. & T. Ry. Co. *v.* Johnson (Tex.), *ante* and *note*.

Minn. 382, 67 N. W. 1002, and 73 N. W. 973. After the case was remanded on the second appeal, another trial was had, the jury returned a verdict for plaintiff, and defendant appeals from an order denying a new trial.

Case Stated.

1. Appellant contends that the evidence will not sustain a verdict for plaintiff. We cannot so hold. The two propositions on which plaintiff relied on the trial were (1) that the gripman, Colbeth, was incompetent; and (2) that defendant knew that fact, or in the exercise of reasonable care should have known it. The evidence on this trial was mainly the same as that on the second trial, discussed in the opinion in the second appeal. It is true, there was on this trial some additional evidence given, and some modifications of the evidence given on the former trial; but what is said in the former opinion still applies, and the evidence is sufficient on both propositions to sustain a verdict for the plaintiff. It would not be profitable here to enter into another discussion of the evidence.

Injury to Employee—Incompetency of Fellow Servant—Evidence and Verdict.

2. At the close of the evidence, defendant requested the judge to charge the jury that they might, in their discretion, find a special verdict, forms for which would be handed to them, giving the facts as claimed by the parties. To this was attached a list of special findings, making complete findings of fact in favor of defendant on all the questions in the case, and in about the same form as the findings of fact for defendant would be if the case had been tried by the judge without a jury. Appellant assigns as error the refusal of the court to give this request, and to sustain its position, cites section 5380, Gen. St. 1894, which, so far as here material, reads as follows: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict; in all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." The contention is that, in an action for the recovery of money or specific real property, the jury have, under this section, an absolute discretion to render a general or a special verdict, and that it is error for the judge to interfere with or control that discretion. There would be much force in the contention that this

Special Verdicts.

is the proper interpretation of the first part of the section, if it were not for the last part of the section quoted above, which provides that the court may in all cases instruct the jury, if "they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." Under this provision the judge may in every case require specific questions of fact to be answered, which will completely cover every issue in the case, and amount in all respects to a special verdict. And, if this is done, it is immaterial whether the jury are required to render a general verdict or not, as the special findings will control and supersede such general verdict. The different parts of this section may be reconciled by interpreting the first part to mean that in an action for the recovery of money or specific real property the judge may, in his discretion, instruct the jury that they may, in their discretion, render a general or a special verdict. We adopt this interpretatfon.

3. It appears by the evidence that Colbeth was employed a part of the time as gripman on the cable line, and a part of the time as motorman on the electric line, and that he was changed back and forth by defendant from the one occupation to the other. On one occasion, while acting as motorman, his car was stalled by reason of there being ice on the rails, which insulated the car wheels, and prevented the electric current from passing off from the wheels to the rails. He did not know that he could start his car by breaking the scale of ice on the rails, so as to make a connection for the current, and was not able to move his car. The judge charged the jury that they might consider these facts, with many others, in determining whether or not Colbeth was competent as a gripman. This is assigned as error. It may be conceded that, if the question of competency was merely as to Colbeth's skill in the science of running a grip car, this part of the charge would be erroneous. But it was claimed that he was also incompetent because he did not have sufficient presence of mind in an emergency, that he was not a man of sufficient judgment, and did not have sufficient strength and acuteness of intellect to be competent for the work of a gripman. On these questions the evidence was competent, and the charge not erroneous. This disposes of all the questions raised having any merit. Order affirmed.

Evidence.

CHICAGO & A. R. CO.

v.

GLENNY *et al.*

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Fire Set by Locomotive—Payment by Insurer—Subrogation.*—An insurance company paying a loss resulting from a fire set by a locomotive through the negligence of the railroad, stands in the position of a surety, and becomes subrogated to the rights of the insured to the extent of such payment.

Variance—Review.—A variance between the allegations and proof cannot be urged for the first time on appeal.

Instructions.—Instructions authorizing a recovery under either count of the declaration are not erroneous, where both charges of negligence state a cause of action, and are sustained by the evidence.

Nul Tiel Corporation.—Where a summons is served upon the defendant railroad as a corporation, and there is no plea of *nul tiel* corporation, defendant is estopped to deny that it is a corporation in an action under 3 Starr & C. Ann. St. p. 3294.

Instructions.—In instructing that the fact that a fire is set by a locomotive is *prima facie* evidence of negligence on the part of the railroad, it is not error to assume that the locomotive alleged to have caused the damage sued for passed along defendant's road, where the fact that it did pass along such road is undisputed.

Fire Set by Locomotive—Negligence—Burden of Proof.*—Under the statute making the fact that fire is communicated to adjoining property by a railroad locomotive *prima facie* evidence of negligence on the part of the railroad, plaintiff, after alleging and proving that the damage to his property was caused by a fire so communicated, may recover without proof of the particular facts constituting the negligence.

Expert Testimony.—The opinion of a witness as to the value of farm machinery based upon his examination of their remains after a fire is admissible.

Same.—Error in admitting expert testimony as to the value of property destroyed by fire is not ground for reversal, where its value as shown by other testimony was not controverted.

*See notes at end of case.

Chicago & A. R. Co. *v.* Glenny

APPEAL by defendant from Second district appellate court. *Affirmed.*

This was an action on the case by appellees against appellant for damages occasioned by fire caused by a passing locomotive on defendant's railroad, destroying certain buildings and personal property belonging to the plaintiffs. There was a trial by jury resulting in a verdict for plaintiffs for $7,849.18, on which, after overruling defendant's motion for a new trial, the court entered judgment. The appellate court having affirmed that judgment, this appeal is prosecuted.

Case Stated.

George S. House, for appellant.

R. W. Barger, for appellees.

WILKIN, J. (after stating the facts). The argument of counsel for appellant here is chiefly devoted to a criticism of the opinion of the appellate court. We concur in the views of that court, and regard the objections urged against the reasoning of the opinion without force.

It appears that the property destroyed was partly covered by insurance, and the insurance company had paid the loss before this action was brought. It is said this suit is in fact brought by that company, the intimation being that, inasmuch as plaintiffs had received compensation for their loss from the insurance company, they cannot maintain this action against the defendant. The insurer stood in the position of a surety, and having paid the loss for which the defendant, by its negligence, was primarily liable, became subrogated to the rights of the plaintiffs to the extent it had paid. If authority is needed in support of this proposition, it will readily be found in our own decisions. Insurance Co. *v.* Frost, 37 Ill. 333; Chadsey *v.* Lewis, 1 Gilman, 153; Express Co. *v.* Haggard, 37 Ill. 465. Other cases might be cited to the same effect, but we regard the law so well settled that it cannot be seriously questioned.

Fire Set by Locomotive—Payment by Insurer—Subrogation.

We are urged to review the evidence for the purpose of determining whether it supports the allegations of the declaration. Waiving the question whether the record preserves a ruling of the trial court on that proposition so as to make it one of law, reviewable in this court, we deem it only necessary to say that we think the testimony fairly tended to support the material averments

Variance—Review.

of the declaration. The real point attempted to be urged is that there was a variance between the allegations and proof. It need scarcely be said that to entitle the defendant to have that question passed upon, even in the appellate court, it must have been pointed out and urged at the time of the trial (Libby, McNeill & Libby *v.* Scherman, 146 Ill. 540, 34 N.E. 801; City of East Dubuque *v.* Burhyte, 173 Ill. 553, 50 N. E. 1077); and this court will not presume that a variance was the ground of a motion to instruct a jury to find for the defendant (Railroad Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680).

Instructions.

Complaint is made of the first and third instructions given to the jury on behalf of plaintiffs. The objection urged against them is that they treat the first and second counts of the declaration as though they averred the same or similar acts of negligence, whereas the first alleges that the negligence consisted in permitting the right of way to be covered with dry grass and other combustible materials, and the second that the negligence consisted in defective appliances and the improper handling of the locomotive. The instructions authorize a recovery under either count of the declaration, in case both charges of negligence are sustained by the evidence. This certainly did not prejudice the defendant. The law authorizes a recovery upon proof of either one of the charges. If both were proved, it was immaterial on which of the counts the jury found. Proof of both would sustain either. But for the reference in the instructions to both the first and second counts, no fault whatever could be found with them.

Nul Tiel Corporation.

The tenth of plaintiffs' instructions is also criticised. It is based on paragraph 123 of the railroad law. 3 Starr & C. Ann. St. p. 3294. The statute reads, "that in all actions against any person or incorporated company," etc. It is insisted that, the defendant not being a person, there must have been proof in the record that it was an "incorporated company," else the statute is inapplicable, and that it was error to give this tenth instruction without that qualification. The summons appears to have been served upon the defendant as a corporation. There was no plea of *nul tiel* corporation, and the defendant was estopped to deny that it was a corporation. Such was the condition of the record when the court was called upon to decide the applicability of this instruction to the case.

It is further insisted the same instruction is faulty in not

limiting the "*prima facie* case" to fire occasioned by an engine "while upon or passing along any railroad in this state." That the engine which set the fire did pass along the defendant's railroad is undisputed. The court, in instructing the jury, was justifiable in assuming that fact.

Instructions.

The further point is made against the instruction that it permits a recovery without proof of the particular acts of alleged negligence. The statute upon which the action was based is a rule of evidence. Having made such allegations in their declaration as stated a cause of action, the plaintiffs had the right to invoke the statute as relieving them of the burden of proof after showing the fire was communicated from the defendant's locomotive, and rest their case without proof of the particular facts constituting the negligence. None of the objections to the tenth instruction are well taken.

Fire Set by Locomotive—Negligence—Burden of Proof.

Expert testimony was admitted over the objection of the defendant, as to the value of the property destroyed. A witness named Dow stated what he observed of the ruins after the fire, and from that observation gave his opinion as to the value of certain farm machinery which had been so burned as to be worthless. It is insisted this testimony was incompetent. We do not think so. It may have been of but little weight, but that was for the jury. Another witness testified as to the depreciation in the value of buildings, generally, by age, and was then permitted to give his opinion as to the value of those destroyed, based upon the description of them given by the witness Glenny, who was acquainted with them, the witness giving the opinion never himself having seen them. The form in which the question was put to the witness as an expert was not strictly proper. The opinions of witnesses as to values may be based upon a hypothetical statement of what has been already proven in the case,—as to the quality, conditions, and situation of the property,—as well as upon their own actual observation. Moore *v.* Railway Co., 78 Wis. 120, 47 N. W. 273. Instead of asking the witness his opinion based upon the testimony already in, the question should have been framed hypothetically, so as to embrace such facts as the evidence was supposed to show. "Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts or the witness is per-

Expert Testimony.

Same.

sonally acquainted with them." Bradner, Ev. p. 537. It has been permitted in some courts to pursue the course taken in this case, but as we said in Pyle *v.* Pyle, 158 Ill., 289, 41 N. E. 999 (on page 300, 158 Ill., and page 1002, 41 N. E.), "the better and proper practice, however, is to put a question to the witness reciting the supposed facts hypothetically upon which the opinion of the expert is wanted." The error in this case was one of form, rather than of substance. The value of the buildings was shown by other testimony, and no evidence was introduced by the defense to controvert the values shown by the plaintiffs. We find no reversible error in the record, and the judgment of the appellate court will be affirmed. Judgment affirmed.

NOTES.

Fires Caused by Railroad Locomotives.—If insured property be destroyed by fire communicated from the engines of a railroad company, the insurance company paying the loss will be subrogated to the rights and remedies of the owner against the wrongdoers. Connecticut F. Ins. Co. *v.* Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Weber *v.* Morris, etc., R. Co., 35 N. J. L., 409; Hartford Ins. Co. *v.* Pennel, 2 Ill. App. 609; Peoria M. & F. Ins. Co. *v.* Frost, 37 Ill. 333; Swarthout *v.* Chicago, etc., R. Co., 49 Wis. 625; Hart *v.* Western R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719; Holcombe *v.* Richmond, etc., R. Co., 78 Ga. 776; St. Louis, etc., R. Co. *v.* Fire Assoc. 55 Ark. 163; Ætna Ins. Co. *v.* Hannibal, etc., R. Co., 3 Dill. (U. S.) 1.

Fires Set by Engines—Particular Fact Constituting Negligence Need Not Be Proved.—Where the evidence shows that a fire originated from an engine running over the defendant's railway, the same proof in many jurisdictions tends to show negligence on the part of the company in setting out the fire, and it is unncessary for the plaintiff to show affirmatively by direct evidence any defect in the construction or condition of the engine, or any negligence in its management. Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 61. The court in discussing the question say: "There is certainly good sense in the rule that proof of proper construction and management of the engine should in all cases be required of the company, which possesses full knowledge of the facts, rather than on the plaintiff, who usually can know little or nothing of the engines or employees of the company:" citing Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Ill. Cent. R. Co. *v.* Mills, 42 Ill. 407; Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110.

Notes

In Mahoney *v.* St. Paul, etc., R. Co., 35 Minn. 361, 25 Am. & Eng. R. Cas. 471, GILFILLAN, C. J. says: "The statute makes the fact of the fire being so scattered *prima facie* evidence of such negligence or defect. The existence of such negligence or defect is still the issue to be presented by the complaint and tried by the jury." Aldridge *v.* G. W. R. Co., 3 M. & G. 515; Piggot *v.* Eastern, etc., Ry. Co., 3 C. B. 229; Smith *v.* London, etc., Ry. Co., L. R. 6 C. P. 14; Gibson *v.* S. E. Ry. Co., 1 Fost & F. 23.

Arkansas.—Tilley *v.* St. Louis, etc., R. Co., 32 Am. & Eng. R. Cas. 324.

Illinois.—Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Ill. Cent. R. Co. *v.* Mills, 42 Ill. 407; Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68. This rule has since been confirmed by statute, chap. 114, § 89, Rev. Stat. of Ill. 1877. Chicago, etc., R. Co. *v.* McCahill, 56 Ill. 28; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95; Pittsburg, etc., R. Co. *v.* Campbell, 86 Ill. 443; Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435.

Iowa.—By statute sec. 1289 Code. Babcock *v.* Chicago, etc., R. Co., 11 Am. & Eng. R. Cas. 64, 62 Iowa, 593 (overruling Gandy *v.* Chicago, etc., R. Co., 30 Iowa, 420); McCummons *v.* Chicago, etc., R. Co., 33 Iowa, 187; Garrett *v.* Chicago, etc., R. Co., 36 Iowa, 121; Engle *v.* Chicago, etc., R. Co. (Iowa), 37 N. W. Rep. 6.

Maryland.—Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 23 Am. & Eng. R. Cas. 342; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251. But see Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242.

Michigan.—Jones *v.* Michigan Cent. R. Co., 25 Am. & Eng. R. Cas. 483, 59 Mich. 437.

Minnesota.—Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60.

It being shown in an action for the recovery of damages upon the ground of negligence, that the fire was communicated from an engine of the defendant to combustible matter on its right of way, and thence to plaintiff's property adjacent thereto, the statute (Gen. St. 1878, c. 34, § 60) raises a presumption of negligence on the part of the defendant, and the burden was upon it of proving the absence of negligence in respect to the condition and management of the engine. Sibelrud *v.* Minneapolis, etc., R. Co. 29 Minn. 58, 7 Am. & Eng. R. Cas. 499; Karson *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 7 Am. & Eng. R. Cas. 501; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 13 Am. & Eng. R. Cas. 460.

Missouri.—Fitch *v.* Pac. R. Co., 45 Mo. 325, overruling Smith *v.* Hannibal & St. Jo. R. Co., 37 Mo. 287; Bedford *v.* Hannibal, etc., R. Co., 46 Mo. 456; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Coale *v.* Hannibal, etc., R. Co., 60 Mo. 227; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Wise *v.* Joplin R. Co., 85 Mo. 178, 29 Am. & Eng. R. Cas. 164.

Notes

Mississippi.—Mobile & Ohio R. Co. *v.* Gray, 62 Miss. 383, 23 Am. & Eng. R. Cas. 373.

Nebraska.—Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268.

Nevada.—Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

South Carolina.—Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39, 13 Am. & Eng. R. Cas. 479.

Tennessee.—Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451; Simpson *v.* East. Tenn., etc., R. Co., 5 Lea (Tenn.), 456.

Texas.—Missouri Pac. R. Co. *v.* Bartlett, 32 Am. & Eng. R. Cas. 343; Gulf, etc., R. Co. *v.* Benson, 32 Am. & Eng. R. Cas. 330. But see Gulf, etc., R. Co. *v.* Halt (Tex. App. 1883), 11 Am. & Eng. R. Cas. 72.

Wisconsin.—Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110.

And see Case *v.* Northern Cent. R. Co., 59 Barb. (N. Y.) 644; Bedell *v.* Long Island R. Co., 44 N. Y. 367; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Gagg *v.* Vetter, 41 Ind. 228.

Contrary Doctrine.—*California.*—Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387.

Connecticut.—Burroughs *v.* Housatonic R. Co., 15 Conn. 124.

Delaware.—Jefferies *v.* Phila., etc., R. Co., 3 Houst. (Del.) 447.

Indiana.—Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Pittsburg, etc., R. Co. *v.* Noel, 77 Ind. 110, 7 Am. & Eng. R. Cas. 524; Pittsburg, etc., R. Co. *v.* Hixon, 110 Ind. 225, 32 Am. & Eng. R. Cas.

Kansas.—Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308.

Maine.—Lowney *v.* New Brunswick R. Co., 78 Me. 479, 29 Am. & Eng. R. Cas. 116.

New York.—Sheldon *v.* Hudson River R. Co., 14 N. Y. 218; McCaig *v.* Erie R. Co., 8 Hun (N. Y.), 599; Rood *v.* New York & Erie R. Co., 18 Barb. (N. Y.) 80; Collins *v.* New York Cent. R. Co., 5 Hun (N. Y.) 499.

North Carolina.—Ellis *v.* Railroad Co., 2 Ired. 138.

Ohio.—Ruffner *v.* Cincinnati, etc., R. Co., 34 Ohio St. 96.

Pennsylvania.—Railroad Co. *v.* Yeiser, 8 Pa. St. 366; Pennsylvania R. Co. *v.* Yerger, 73 Pa. St. 121; Reading, etc., R. Co. *v.* Latshaw, 93 Pa. St. 449, 2 Am. & Eng. R. Cas. 267. But see Hyett *v.* Phila., etc., R. Co., 23 Pa. St. 373.

And see Field *v.* New York Cent. R. Co., 32 N. Y. 339; Collins *v.* New York, etc., R. Co., 5 Hun (N. Y.), 499; Shelton *v.* Hudson River R. Co. 14 N. Y. 218; Macon R. Co. *v.* McConnell, 27 Ga. 481; Aldridge *v.* Railroad Co., 3 M. & G. 515; M. & E. R. Co. *v.* State, 36 N. J. L. 553; McCready *v.* Railroad Co. 2 Strobh. (S. Car.) L. 356; Jefries Phila., etc., R. Co., 3 Houst. (Dela.) 447.

GALVESTON, H. & S. A. RY. CO.

v.

HERTZIG.

(*Court of Civil Appeals of Texas, May 11, 1898.*)

Fires Set by Locomotives—Admissions—Evidence.*—In an action against a railroad company for damages resulting from a fire started by sparks from defendant's engine, evidence is admissible to show that defendant paid third parties for damages resulting to their property from the same fire, as the proof of such fact would tend to show an admission on the part of defendant that the fire resulted from its own negligence.

Objections to Evidence.—An objection to a question, which is proper does not operate as an objection to incompetent evidence embraced in the answer.

Evidence of Other Fires.*—Evidence was admissible to show that fires had been caused by one of defendant's locomotives at other points on the same day that plaintiff's property was damaged by the fire set by defendant's locomotive.

APPEAL by defendant from Fayette county district court. *Affirmed.*

Brown, Lane & Jackson, for appellant.
Phelps & Wilrich, for appellee.

PER CURIAM. This is a suit by appellee to recover damages for injury to his pasture, and the fence around same, by a fire resulting from the escape of sparks alleged to have been negligently allowed to escape from one of appellant's engines. The evidence showed that the fire was caused by sparks emitted from an engine of appellant, and is sufficient to warrant the finding of the jury that this resulted from appellant's negligence, and that the damage to appellee amounted to $375, the amount recovered. The fire was first set to grass in a pasture belonging to one

Case Stated.

*See notes at end of case.

Urbich, and spread to those of plaintiff and of one Viviola. Upon the trial, appellee asked Urbich and Viviola, when they were testifying as witnesses, "Didn't defendant settle with you for your damages claimed by you by reason of the same fire that burned plaintiff's property, involved in this suit?" to which defendant objected that it was irrelevant and incompetent because, if defendant had compromised with one man, it was not evidence of its liability to another. The objection was overruled. The bill of exceptions states that each of the witnesses answered that, "it (defendant) had compromised with him by giving 75 cents an acre for his grass burned, and this included posts destroyed." The statement of facts does not show that anything was said by the witnesses as to a compromise further than may be implied in the statement that a settlement was made, in which they accepted a less sum than they had demanded. It will be seen that the question objected to did not call for any evidence as to a compromise, and that according to the bill of exceptions the settlement was first referred to as a compromise in the answer, which was not objected to. An objection to a question which is proper does not operate as an objection to incompetent evidence embraced in the answer. Such being the case, the point for our decision, is, was the fact that defendant paid others for damages which resulted just as plaintiff's did, and from the same cause, admissible, as involving the admission that the cause of the fire was its own negligence? We think that it was. The payment of the claims of the others, did not necessarily admit a liability either to them or to the plaintiff; but, unexplained, it tends in that direction. It was susceptible of explanation, and its weight depended upon such facts as might be adduced to qualify it, and was therefore proper to go before the jury for their consideration. Wells *v.* Fairbanks, 5 Tex. 582; 2 Whart. Ev. § 1081. If the evidence actually given by the witnesses was objectionable, as involving a statement of a compromise, which is made by no means clear from the record, the question did not call for it, and further objection should have been made.

Fires set by Locomotives—Admissions—Evidence.

Objections to Evidence.

There was no error in admitting the evidence of Okrolie and Rhodes, that fires had been caused by one of defendant's engines at other points on the same day as that in question. Railway Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. Rep. 163.

Evidence of Other Fires.

The charge of the court submitted the law governing the

case, as it has been established by our decisions, fully and accurately. The paragraph complained of, when considered in connection with the whole of it, was not error.

The judgment is affirmed.

NOTES.

Fires Set by Engines—Admissions—Evidence.—In an action under So. Car. Gen. St. § 1511, to recover damages for personal property destroyed by fire beyond defendant's right of way, testimony is inadmissible to prove that defendant had paid for cotton burned at the same time, which had been received by the company for carriage. Thompson *v.* Richmond & D. R. Co., 24 So. Car. 366.

Same—Evidence of Other Fires.—See Thomas *v.* New York, C. & St. L. R. Co. (Pa.), 9 Am. & Eng. R. Cas., N. S., 132, and *note*, p. 135.

SAVANNAH, F. & W. RY. CO.

v.

COMMERCIAL GUANO CO.

(*Supreme Court of Georgia, March 22, 1898.*)

Carriers of Freight—Damage to Goods—Consignor's Right of Action.—Where a consignee of freight refuses to receive goods on account of damage done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier.

Same—Liability of Initial Carrier.*—Where a railroad company receives on its cars from a consignor, at its warehouse in a city, freight to be conveyed from its depot in another portion of the same city to a point of destination beyond its line, which cars are furnished at the request made of it by the consignor, and where the entire freight charges are paid by the consignor to such company for transportation of the goods from its depot, this company is the initial carrier, and, as such, is responsible for any liability for the loss or damage of the goods in the course of transportation. This is true notwithstanding another railroad company owned the spur track leading from the warehouse of the consignor to a point intermediate between there and the depot above mentioned, and received compensation for trackage, or for the transfer over its spur track, it appearing that the latter company received no portion of the freight charges, and did not undertake a through transportation of the goods.

*See note at end of case.

Abstracts

Evidence and Verdict.—The facts in this case demanded the verdict found by the jury; and, if there were any errors in the rulings or charges of the court complained of, they were immaterial, and the court did right in overruling the motion for a new trial.
(Syllabus by the Court.)

ERROR by defendant from Savannah city court. *Affirmed.*

Erwin, Du Bignon, Chisholm & Clay, for plaintiff in error.
Charlton, Mackall & Anderson, for defendant in error.

NOTE.

Liability of Railway Company Transferring Cars as a Carrier.—Where cars are switched by a railroad company from the last carriers line to the consignee's warehouse on such company's track, such company is a connecting carrier as to the goods so transferred. Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525. In this case a carload of sugar sent from Louisiana was consigned to the plaintiff at Wichita. It was shipped over the Texas and Pacific Company's line, and was brought to Wichita by the St. Louis and S. F. Company. It was there placed on the "Y," and switched by the defendant company over its track to the spur track in rear of the plaintiff's warehouse, for which service the St. Louis and S. F. Company paid it the regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment and before the plaintiff had had a reasonable time in which to remove it; ALLEN, J., saying: "A railroad transporting a passenger or a carload of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis and S. F. Ry. Company, while it might render that company also responsible, could not relieve the defendant company from its liability as a carrier."

But a mere transfer company employed by the consignee to remove goods from a station is not a connecting carrier. Nanson *v.* Jacob, 32 Am. & Eng. R. Cas. 553, 3 Am. St. Rep. 531, 93 Mo. 331, *affirming* 12 Mo. App. 125. See also Hooper *v.* Chicago, etc., R. Co., 9 Am. Rep. 439, 27 Wis. 81. Nor is a transfer company which is employed to haul gooda between the depots of connecting carriers in the same city. Missouri Pac. R. Co. *v.* Young, 25 Neb. 651. See also Western, etc., R. Co. *v.* Exposition Cotton Mills, 35 Am. & Eng. R. Cas. 602, 81 Ga. 522; Roach *v.* Canadian Pac. R. Co., 1 Manitoba 158.

STATE

v.

OTIS.

(*Supreme Court of Kansas, Feb. 11, 1899.*)

Free Transportation to Shippers of Live Stock—Interstate Shipments.—Chapter 167 of the Laws of 1897, purporting to require railroad companies to furnish free transportation to shippers of live stock in certain cases, and providing remedies and penalties for violations of its provisions, has no application to nor effect upon interstate shipments.

(Syllabus by the Court.)

APPEAL by the state from Russell county district court. *Affirmed.*

L. C. Boyle, Atty. Gen., and *J. C. Rubpenthal*, for the State.

A. L. Williams, N. H. Loomis, and *R. W. Blair*, for appellee.

KALFUR

v.

BROADWAY FERRY & M. AVE. R. CO.

(*Supreme Court of New York, Appellate Division, Second Department, Nov. 22, 1898.*)

Actions for Personal Injuries—Reduction of Damages — Discretion of Trial Court.—It is within the sound discretion of the trial court, in an action for personal injuries, to reduce an excessive verdict.

Same—Damages—Appeal.*—But where the trial court has not exercised such discretion, and it appears that plaintiff, a boy eighteen months of age when injured, as the result of defendants' negligence, lost his leg above the knee, and he being entitled to compensation for such loss, and the consequent pain and suffering, the supreme court will not decide that a verdict for $15,941.25 is excessive.

APPEAL by defendant from Kings county trial term. *Affirmed.*

*See notes at end of case.

Abstracts

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

Thomas S. Moore, for appellant.

Charles J. Patterson, for respondent.

NOTES.

Loss of Legs—Damages.—In the following cases the damages were held not to be excessive.

United States.—The William Branfoot, 52 Fed. Rep. 390 ($2,300 not inadequate).

Arizona.—Hobson *v.* New Mexico, etc., R. Co., (Arizona 1886) 11 Pac. Rep. 545 ($15,000, loss of both legs).

Colorado.—Colorado Midland R. Co. *v.* O'Brien. 16 Colo. 219 ($13,000, loss of both legs).

Illinois.—Chicago, etc., R. Co. *v.* Holland, 18 Ill. App. 418 ($25,000, loss of both legs); Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33 ($16,000, permanent loss of leg by paralysis); Chicago City R. Co. *v.* Wilcox, 33 Ill. App. 453 ($15,000).

Kansas.—Atchison, etc., R. Co. *v.* Moore, 31 Kan. 197 ($10,000).

Missouri.—Hollenbeck *v.* Missouri Pac. R. Co., (Mo. 1896) 34 S. W. Rep. 494 ($10,000); Oglesby *v.* Missouri Pac. R. Co., (Mo. 1896) 37 S. W. Rep. 829 ($15,000).

New York.—Ehrman *v.* Brooklyn City R. Co., 131 N. Y. 576 ($25,000, plaintiff a young child); Murray *v.* Brooklyn City R. Co., (Brooklyn City Ct.) 7 N. Y. Supp. 900 ($18,000, loss of leg and of use of arm); Akersloot *v.* Second Ave. R. Co., 59 N. Y. Super Ct. 555, ($12,000, plaintiff a young child); Alberti *v.* New York, etc., R. Co., 43 Hun (N. Y.) 421 ($25,000, loss of both legs); Richmond *v.* Second Ave. R. Co., 76 Hun (N. Y.) 233 ($9,000); Garoni *v.* Compagnie Nationale, etc., (C. Pl.) 14 N. Y. Supp. 797 ($10,000).

Texas.—Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421 ($8,000); Ft. Worth, etc., R. Co. *v.* Robertson, (Tex. 1891) 16 S. W. Rep. 1093 ($10,000); Texas, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1896) 34 S. W. Rep. 186 ($12,500, loss of leg and use of arm).

Washington.—Roth *v.* Union Depot Co., 13 Wash. 525 ($15,000).

Wisconsin.—Berg *v.* Chicago, etc., R. Co., 50 Wis. 419 ($11,000); Hinton *v.* Cream City R. Co., 65 Wis. 323 ($5,000, plaintiff an elderly woman); Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106 ($18,500, plaintiff a child, who lost both legs and was otherwise injured); Nadau *v.* White River Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29 ($9,000).

Injuries to Legs.—In the following cases the damages were held not to be excessive:

Illinois.—Chicago City R. Co. *v.* Mumford, 97 Ill. 560 ($5,000, fract-

ure); Chicago *v.* Crooker, 2 Ill. App. 279 ($4,000, fracture of patella, inducing permanent disability); Chicago *v.* Chase, 33 Ill. App. 551 ($2,000, fracture).

Iowa.—Funston *v.* Chicago, etc., R. Co., 61 Iowa 452 ($8,000, fracture resulting in shortening and stiffness).

Kansas.—Topeka *v.* Bradshaw, (Kan. App. 1897) 48 Pac. Rep. 751 ($2,000, fracture).

Kentucky.—Chesapeake, etc., R. Co. *v.* Friel, (Ky. 1897) 39 S. W. Rep. 704 ($1,650, sprained ankle).

Minnesota.—Rogers *v.* Chicago Great Western R. Co., 65 Minn. 308 ($3,000, injury resulting in chronic inflamation of knee).

Missouri.—Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654 ($2,000 for a sprained ankle); Dowd *v.* Westinghouse Air Brake Co., 132 Mo. 579 ($100, compound fracture, not inadequate).

Nebraska.—Lincoln *v.* Staley, 32 Neb. 63 ($1,250, permanent stiffening of knee).

New York.—Selleck *v.* J. Landon Co., 59 Hun (N. Y.) 627, 37 N. Y. St. Rep. 511 ($6,000, fracture with permanent results); Beltz *v.* Yonkers, 74 Hun (N. Y.) 73 ($5,000, fracture); McCooey *v.* Forty-second St. Ferry R. Co., 79 Hun (N. Y.) 255 ($1,500, street car running over foot); Stapleton *v.* Newburgh, 9 N. Y. App. Div. 39 ($1,100, fracture); Fitch *v.* Broadway, etc., R. Co., 58 N. Y. Super. Ct. 575 ($7,000, fracture of neck of femur); Mitchell *v.* Broadway, etc., R. Co., 70 Hun (N. Y.) 387 ($15,000, fracture inducing shortening and permanent stiffness); Vail *v.* Broadway R. Co., 31 Abb. N. Cas. (Brooklyn City Ct.) 56, 6 Misc. Rep. (N. Y.) 20 ($7,500, fracture, shortening and stiffening limb); Thomas *v.* Union R. Co., 18 N. Y. App. Div. 185 ($7,500, fracture, shortening and stiffening limb).

Texas.—Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321 ($3,000, leg bruised and bone affected); Texas, etc., R. Co. *v.* Echols, (Tex. Civ. App. 1894) 25 S. W. Rep. 1087 ($9,000, fracture with permanent injurious results).

Virginia.—Danville, etc., R. Co. *v.* Brown, 90 Va. 340 ($7,500, thigh crushed, leg shortened); Richmond R., etc., Co. *v.* Garthright, 92 Va. 627 ($1,000, legs cut and bruised, inducing temporary disability).

Wisconsin.—Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463 ($2,700, dislocation of hip and fracture of vertebræ).

Loss of Foot.—Georgia R., etc., Co. *v.* Keating, 99 Ga. 308 ($9,000); Jordan *v.* New York, etc., R. Co., 16 Daly (N. Y.) 130 ($11,000); Commerford *v.* Atlantic Ave. R. Co., 8 N. Y. Misc. Rep. (Brooklyn City Ct.) 599 ($8,500, loss of several toes); Manley *v.* New York Cent., etc., R. Co., 18 Misc. Rep. (N. Y. Supreme Ct.) 502 ($9,000); Elliott *v.* Newport St. R. Co., 18 R. I. 707 ($6,950); Texas Pac. R.

Co. *v.* Overheiser, 76 Tex. 437 ($7,500); Bowers *v.* Union Pac. R. Co., 4 Utah 215 ($10,000); Chipman *v.* Union Pac. R. Co., 12 Utah 68 ($10,500, plaintiff a female child).

Loss of, or Injury to, Leg.—In the following cases the damages were held to be excessive:

Georgia.—Southwestern R. Co. *v.* Singleton, 66 Ga. 252 ($14,833, fracture of leg).

Illinois.—Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561 ($10,000, fracture of leg, producing permanent shortening, plaintiff an aged man).

Iowa.—Lombard *v.* Chicago, etc., R. Co., 47 Iowa 494 ($4,000, for broken leg); Kroener *v.* Chicago, etc., R. Co., 88 Iowa 16 ($12,000, for loss of foot).

Minnesota.—Slette *v.* Great Northern R. Co., 53 Minn. 341 ($4,100, for broken leg); Kennedy *v.* St. Paul City R. Co., 59 Minn. 45 ($3,000, foot bruised, no bones broken); Johnson *v.* St. Paul City R. Co., 67 Minn. 260 ($4,000, fracture of ankle).

Montana.—Kennon *v.* Gilmer, 5 Mont. 257, 51 Am. Rep. 45 ($20,750, loss of foot).

New York.—Pfeffer *v.* Buffalo R. Co., 4 N. Y. Misc. Rep. (Buffalo Super Ct.) 465 ($20,000, for loss of foot); Bailey *v.* Rome, etc., R. Co., 80 Hun (N. Y.) 4 ($16,000, for loss of leg); Shortsleeves *v.* New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. Supp. 1105 ($3,500, for permanent lameness); Corcoran *v.* Ulster, etc., R. Co., (Supreme Ct.) 40 N. Y. Supp. 1117 ($1,000, for sprained ankle); Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463 ($25,000, for loss of leg); Bronson *v.* Forty Second St., etc., R. Co., 67 Hun (N. Y.) 649, 50 N. Y. St. Rep. 740 ($11,000, for broken leg); Peri *v.* New York Cent., etc., R. Co., 87 Hun (N. Y.) 499 ($10,000, for loss of foot).

Wyoming.—Union Pac. R. Co. *v.* House, 1 Wyoming 27 ($10,000, for broken leg).

BECKER

v.

ALBANY RY.

(*Supreme Court of New York, Appellate Division, Third Department, Nov. 16, 1898.*)

Personal Injuries—Excessive Damages—Future Pain and Suffering.*—In an action for personal injuries, it appeared that plaintiff, as the result of defendant's negligence, was afflicted with "neuras-

*See Omaha St. Ry. Co. *v.* Emminger (Neb.), *ante*, p. 188, and *notes* p. 193 *et seq.*

thenia," which had caused her much pain during a period of about 19 months; that she was likely to remain in the same condition for an undetermined period of time; but would ultimately recover, the majority of persons so afflicted recovering in from one to six years; and that she was not entitled to recover damages for loss of earnings, expenses of sickness, or for medical attendance. *Held*, that a verdict for $10,000, was excessive, and that a new trial would be granted, unless plaintiff agreed to reduce the amount of damages to the sum of $4,000.

APPEAL by defendant from trial term. *Reversed, on conditions.*

Argued before PARKER, P. J., and LANDON, PUTNAM, and MERWIN, JJ.

Rosendale & Hessberg (*S. W. Rosendale*, of counsel), for appellant.

Mark Cohn, for respondent.

WARD

v.

OHIO RIVER & C. RY. CO.

(*Supreme Court of South Carolina, July 19, 1898.*)

Bill for Medical Services—Reasonableness—Physicians' Opinions.* —Physicians are competent, as experts, to testify as to the reasonableness of charges for medical attendance.

APPEAL by defendant from York county circuit court of common pleas. *Reversed.*

N. W. Hardin, and *Geo. W. S. Hart*, for appellant.

Finley & Brice, for respondent.

NOTE.

Medical Services—Reasonableness of Bill—Opinions.—On the question of the reasonable value of medical services rendered, evidence of physicians living in the vicinity of the plaintiff's residence is competent to show what the services of the attending physician were worth. Atchison *v.* Rose, 43 Kan. 605.

CONTINENTAL TRUST CO.

v.

TOLEDO, ST. L. & R. C. R. CO.

(*Circuit Court, N. D. Ohio, W. D., Oct. 24, 1898.*)

Fires Set by Locomotives—Railroads not Insurers.—Under the

laws of Ohio, negligence has not been eliminated as an essential element in actions for loss from fires set by locomotives.

Clayton W. Everett and *Doyle & Lewis*, for intervening petitioner.

Clarence Brown, for receiver.

TAFT, Circuit Judge, delivering the opinion, said: "The supreme court of Ohio in Ruffner *v.* Railroad Co., 34 Ohio St. 97, held that it was necessary, in suits against railroad companies for loss occasioned by fire, to prove negligence on the part of the railroad company where fire is communicated to adjacent property from its locomotives by escaping sparks; that the mere fact, without proof of negligence, will not support the action. This case, of course, put the affirmative burden upon the plaintiff of showing that the escaping of the sparks, and the communication of fire thereby, were due to the negligence of the railway company. By an act passed the 9th of April, 1885 (82 Ohio Laws, p. 118), every railroad company was required to place spark arresters on their locomotives used in operating such railroads, and to maintain them in proper condition. The second section imposed a penalty for every violation of the first section, and provided that the court of common pleas might enjoin any railroad company from operating on its railroad any locomotive not provided with the device. By the act of March 24, 1890 (87 Ohio Laws, p. 99), every railroad company was required to keep its right of way clear and free from high grass, weeds, and other combustible material liable to take and communicate fire from passing locomotives to abutting or adjacent property. The act provided further that the company should be liable for damages sustained by the owner or occupant of abutting property from any carelessness or neglect to keep such right of way clear of combustible material. The second section gave persons of adjacent property the right, after 20 days' notice in writing, to move all the combustible material from the right of way of the road, and to collect the expense for the same from the railroad company. Thereafter, on April 26, 1894, the act in question was passed. Before the passing of this act it will be observed that the railroad companies were required to do certain things—First, to have a spark arrester, and keep it in proper condition; and, second, to keep their right of way free from combustible material. A failure to comply with either of these statutory obligations would be regarded as negligence *per se*. Railroad Co. *v.* Van Horne, 37 U. S. App. 262, 16 C. C. A. 182, and 69 Fed. 139; Railway Co. *v.* Craig, 37 U.

S. App. 658, 19 C. C. A. 631, and 73 Fed. 642; Krause *v.* Morgan, 53 Ohio St. 26, 40 N. E. 886. And any loss arising therefrom must be compensated in damages, unless it could be shown that the plaintiff had been guilty of contributory negligence in bringing about the injury. If, however, the company kept its right of way clear, and kept spark arresters upon its engines, it still might be guilty of negligence causing loss; and the burden of showing such negligence was still upon the plaintiff, under the decision of Ruffner *v.* Railroad Co., 34 Ohio St. 97. In this condition of the law the act of 1894 was passed. If the law comprised only the first section, there would be little difficulty in construing it. It would make the railroad company liable in every case where its sparks ignited and destroyed the property of adjacent owners, whether the fire originated on the company's own lands, and was thence communicated to property of adjacent land, or was communicated directly by locomotive sparks to the property of adjacent landowners; and the question of negligence would be irrelevant and immaterial. That such a statute would be constitutional is conclusively settled for this court by the decision of the supreme court of the United States in Railroad Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. 243. But the difficulty of such a construction of the statute is that it is impossible to reconcile it with the provision in section 2. The statute is most bunglingly worded, and, when a court is called upon to construe it, it can only do its best to reach that result which will necessitate the rejection of the fewest words of the statute. It would seem that the statute had been made up of two different bills, with different purposes, thrown together into hotchpot. By the second section, which is to have future as well as retroactive application, it is provided that, in all actions against any person or incorporated company, injury to property occasioned by fire communicated by any locomotive engine shall be taken as *prima facie* evidence to charge with negligence a corporation or person or persons who shall at the time of such injury by fire be in the use or occupation of such railroad, either as owners, lessees, or mortgagees, and also those who shall at such time have the care and management of such engine. The second section applies to railroad companies as well as the first, because it applies to owners, lessees, and mortgagees of railroads operating them. If, however, the first section makes railroad companies absolutely liable without respect to negligence, then the second section, in describing what

shall constitute a *prima facie* case of negligence, is futile and meaningless. It will not do to say that section 2 can have sufficient operation in its application to those persons operating railroads who are not railroad companies, because that would necessarily imply that for the same injury a railroad company operating a railroad would be absolutely liable, whereas an individual operating a railroad could only be held on proof of negligence. Such a classification of persons could certainly not be supported under the constitution of Ohio. It would be a general law without uniform operation. The only way in which the first and second sections can be reconciled and harmonized is to hold that the first section, except in the last clause, in which it provides a new rule of evidence, is merely declaratory of the law as it existed, and that the second section enacts a rule of evidence for the actions described in the first section. For this reason, I do not think that the legislature of Ohio has yet eliminated negligence as an essential element in causes of action of this class."

AMOS
v.
ATLANTA RY. CO.
(*Supreme Court of Georgia, July 19, 1898.*)

Injuries to Minors Resulting in Death—Right of Action.—A tortious act which deprives a minor of his ability to render valuable services will give the parent a right of action against the wrongdoer; although such tort may result in the death of the minor, and although at the time of the injury he may be serving, for a violation of a penal law, a term in the chain gang, which expires in a short time, and before his majority.

Same—Abandonment by Father—Rights of Mother.*—A mother has a right of action for such a tort when the father has abandoned his family and all custody and control of the minor. The allegation in this petition of such abandonment by the father is sufficient as against a general demurrer.

(Syllabus by the Court.)

ERROR by plaintiff from Atlanta city court. *Reversed.*

Arnold & Arnold, for plaintiff in error.

L. A. Dean and *King & Spalding*, for defendant in error.

NOTE.

Children—Death by Wrongful Act—Abandonment by Father—Mother's Right of Action.—A married woman who has been deserted

by her husband may sue and recover for the wrongful death of her and his minor child. Kerr *v.* Pennsylvania R. Co., 169 Pa. St. 95, 36 W. N. C. (Pa.) 325; Pittsburg, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269; East Tennessee, etc., R. Co. *v.* Maloy, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220.

LIEBERMAN

v.

THIRD AVE. R. Co.

(*City Court of New York, General Term, Nov. 18, 1898.*)

Action by Infant for Personal Injuries—Wages Lost.—In an action for personal injuries by an infant over 20 years through his father, as his guardian *ad litem*, where wages lost because of the injuries are claimed as an item of plaintiff's damages in his petition for the appointment of his father as such guardian, it was not error to instruct that they were recoverable, the fact that the father consented to act as guardian precluding him from recovering such wages in his own behalf.

APPEAL by defendant from trial term. *Affirmed.*

Argued before FITZSIMONS, C. J., and CONLAN and O'DWYER, JJ.

Hoadly, Lauterbach & Johnson, for appellant.

Max D. Steuer, for respondent.

SOUTHERN RY. CO.

v.

THARP.

(*Supreme Court of Georgia, May 25, 1898.*)

Injuries to Stock—Tax Return as Evidence of Value of Stock.*—In a suit for damages resulting from killing live stock, where the only issue for trial was the value of the stock killed, the last original return of the property for taxes made by the plaintiff, specifying the amount for which the property was given in, was admissible in evidence against the plaintiff as a circumstance for the jury to consider in passing upon the issue submitted.

(Syllabus by the Court.)

ERROR by defendant from Telfair county superior court. *Reversed.*

*See note at end of case.

Abstracts

DeLacy & Bishop and *Eason & McRae*, for plaintiff in error.

D. C. McLennan, for defendant in error.

NOTE.

Tax List—Admissibility as Evidence.—Plaintiff testified that the value of a building burned was $3500. It had been put into her tax list by her husband as her agent at a valuation of $800. *Held*, that this tax list was not admissible in evidence against her to show that the building was worth less than $3500, nor to contradict the testimony. Martin *v.* New York & N. E. R. Co., 62 Conn. 331, 25 Atl. Rep. 239.

In a suit for the recovery of personal property, the tax list sworn to by a party showing no claim to the property is receivable in evidence against him. Lefever *v.* Johnston, 79 Ind. 554.

Assessment lists for taxation are not competent evidence either for or against the lister to establish the value of property for purposes other than taxation; especially so where it is sought to arrive at the value of one article by proving the value of others with which that in question was listed. Cincinnati, H. & I. R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. Rep. 571; Martin *v.* New York & N. E. R. Co., 62 Conn. 331, 25 Atl. Rep. 239.

SOUTHERN RY. CO.
v.
EARLY.

(*Supreme Court of Georgia, July 26, 1898.*)

Injury to Stock—Presumption of Negligence Rebutted.*—The presumption of negligence against the company by proof of the killing of live stock by the running of its train was rebutted and overcome by uncontradicted and unimpeached testimony clearly showing that the defendant was in the exercise of all ordinary and reasonable care and diligence when the injury occurred. The verdict for the plaintiff, therefore, was contrary to evidence, and the judge erred in not sustaining the petition for *certiorari* on this ground.

(Syllabus by the Court.)

ERROR by defendant from Floyd county superior court. *Reversed.*

Shumate & Maddox, *C. W. Underwood*, and *C. Rowell*, for plaintiff in error.

Fouche & Fouche, for defendant in error.

*See Central of Georgia Ry. Co. *v.* Wood (Ga.), 11 Am. Eng. R. Cas., N. S., 850, and *note*, p. 851. *et seq.*

WILLIAMS, STATE'S ATTY.

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Court of Errors of Connecticut, July 26, 1898.*)

Order to Construct Bridge over Street—Mandamus—Parties.—*Mandamus* by the state is the proper remedy to secure obedience to an order of a court of common council of a city requiring a railroad company to substitute an iron bridge over its tracks in a public street of such city for an existing wooden bridge; and in an application for such writ the city is not a party.

Appeal—Review.—The affirmance of such an order by a judge of the superior court upon an appeal for a review of the order by the railroad company, is a final adjudication.

Same—Subsequent Statute.—The act of 1897 providing for the determination by the railroad commissioners of plans for the construction of such public works does not apply to a case adjudicated before its enactment.

Constitutional Law.—An act of the legislature opening or vacating a judgment is void, if for no other reason, because it is an attempted invasion of the judicial prerogative.

Province of Court.—In deciding that common convenience and necessity required an iron bridge to be built over railroad tracks in a city street, the superior court determined a judicial question.

APPEAL by respondent from New Haven county superior court. *Affirmed.*

Application by William H. Williams, state's attorney, against the New York, New Haven & Hartford Railroad Company, for a writ of *mandamus*. Appeal from an order overruling a motion to quash the temporary writ, and granting a peremptory writ of *mandamus*.

NOTE.

Railway Companies—Construction of Bridge—Mandamus.—The writ of *mandamus* has been awarded to compel a railway company to build a bridge and keep it in repair. People *v.* Boston, etc., R. Co., 70 N. Y. 569; People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427; State *v.* Gorham, 37 Me. 451.

And it is no objection to granting such relief that the company is liable to indictment for failing to erect or maintain such bridges. People *ex rel. v.* Troy & B. R. Co., 37 How. Pr. (N. Y.) 427.

Towns may compel a railroad bound to maintain such bridges to make any reasonable repairs by the writ of *mandamus*, or if they

have been obliged to make expenditures thereon, may reimburse themselves by an action on the case. State *v.* Gorham, 37 Me. 451.

A company wholly without funds will not be compelled by *mandamus* to construct a bridge in lieu of a level crossing pursuant to an order of the board of trade. *In re* Bristol & N. S. R. Co., L. R., 3 Q. B. D. 10, 47 L. J. Q. B. D. 48, 26 W. R. 236.

LITTLE ROCK, H. S. & T. RY. CO. *et al.*

v.

SPENCER *et al.*

(*Supreme Court of Arkansas, April 2, 1898.*)

Mechanic's Lien—Contractors—Construction of Statute.*—The statute of Arkansas providing, in substance, that every laborer, or other person who performs construction work upon a railroad shall have a lien upon the road bed, etc., does not apply to a contractor who merely furnishes labor.

APPEAL by defendants from Garland chancery court. *Reversed in part.*

Cockrill & Cockrill, for appellants.

Greaves & Martin and *Rose, Hemingway & Rose*, for appellees.

HUGHES, J., delivering the opinion, said: It appears from the evidence that the appellees had the work done, as contractors,—that they furnished the labor and appliances necessary for the work, and paid for the same,—but it does not appear that they did personally any labor or work upon the railroad. Were they entitled to a lien upon the road, under the section of the statute quoted? It is not an easy undertaking, frequently, to distinguish between the kind of work and labor which is entitled to a lien, and that which is mere professional and supernumerary employment, and not fairly coming within the meaning of the terms used in the statute. It has been held that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor. Stryker *v.* Cassidy, 76 N. Y. 50; Insurance Co. *v.* Rowand, 26 N. J. Eq. 389. In determining the question under consideration, it is important to look closely to the act of the legislature, and to consider the policy of such legislation, and the intent of the legislature

*See note at end of case.

in passing the act in question. The act is entitled "An act to protect employees and other persons against railroad companies." It will be observed that the act gives a lien only to such "mechanic, builder, artisan, workman, laborer, or other person, *who shall do or perform any work or labor* upon, or furnish any materials, machinery, fixtures or other things towards the equipment, of or to facilitate the operation of, any railroad," etc. We emphasize the words, "who shall do or perform any work or labor." In Balch *v.* Railroad Co., 46 N. Y. 521, it is held that "the term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services, or to the services of others to take charge of the teams while engaged in the service." Gurney *v.* Railway Co., 58 N. Y. 358; Aikin *v.* Wasson, 24 N. Y. 482. In Lehigh Coal & Nav. Co. *v.* Central R. Co., 29 N. J. Eq. 252, it is held that the right of preference under such a statute "is personal, inhering alone in the person who actually performs labor or service." Section 6251 of the Digest, above quoted, was intended to secure and protect only the personal earnings of mechanics, builders, artisans, workmen, or laborers, or other persons who do or perform any work or labor upon any railroad, or furnish any material, machinery, fixtures or other things towards the equipment, or to facilitate the operation, of any railroad. It does not apply to a contractor who does not actually perform any work or labor. So far as he may actually labor, he may come within the scope and meaning of this statute. That the purpose of this statute was to give a lien to those named in it for the work and labor by them actually performed is apparent. But its provision is limited to such as actually performed work or labor. "They are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor is, as a rule, just the opposite, and for this reason the object or purpose of a lien law for one by no means makes an argument for the other." Mohr *v.* Clark, 3 Wash. T. 440, 19 Pac. 28; Aikin *v.* Wasson, 24 N. Y. 482. "The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who furnishes labor." 2 Jones, Liens, § 1630. Considering the language of the statute, and the purpose of its enactment, we are constrained to hold that the judgment and decree in this

case, in so far as it declares a lien upon the roadbed, etc., of the railway, is erroneous."

NOTE.

Mechanic's Lien—Contractors as Laborers.—Contractors who supply laborers and teams to work on a railroad by the day are not "laborers" or employees within the meaning of Kentucky Act of March 20, 1876, giving a lien for work done or materials furnished in keeping a railroad as a going concern; but such persons may have a lien under the act of March 27, 1888, giving a lien to persons who furnished labor or materials for the construction or improvement of any railroad or other public improvement. Tod *v.* Kentucky Union R. Co., 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.

A person who takes a contract to do certain work on a railroad, and then employs others to do it or assists in doing it, is not a "laborer" within the meaning of New York Act of 1850, ch. 140, § 10. People *v.* Remington, 10 N. Y. S. R. 310, 45 Hun 329; affirmed in 109 N. Y. 631, *mem.*, 16 N. E. Rep. 680, *mem.*

One who performs a contract to deliver lumber by hiring teams and drivers, but who does no hauling himself, is not a "laborer" within the meaning of Pa. Act of April 9, 1872, and is not entitled to the preference provided by that act. In the contemplation of the act, "laborers" are those who perform with their own hands the contract they make with the employer. Wentroth's Appeal, 82 Pa. St. 469.

Texas Const. art. 16, § 35, which requires the legislature to pass laws to protect laborers on railroads and other public works, and the act of Aug. 7, 1876, passed in pursuance of the constitutional provision, have no reference to contractors or builders. Tyler Tap R. Co. *v.* Driscol, 52 Tex. 13.

Contractors and sub-contractors are not "laborers" within meaning of statute giving right of action for labor debts. Chicago, etc., R. Co. *v.* Sturgis (Mich.), 6 Am. & Eng. R. Cas. 619.

MISSOURI PAC. RY. CO.

v.

FOX.

(*Supreme Court of Nebraska, Nov. 17, 1898.*)

Actions—Revivor.—When revivor of an action is sought by conditional order, the hearing in pursuance thereof is the proper oc-

casion to try the right of the successor in whose name revivor is attempted. By the absolute order, that matter becomes *res judicata*, and cannot be retried with the case on its merits.

Same—Service.—Service of a conditional order of revivor must be in the same manner as a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served.

Attorneys.—The authority of an attorney who actually enters an appearance will be presumed to justify him in so doing.

Order of Revivor—Service—Waiver.—A failure to serve a conditional order of revivor goes only to the jurisdiction of the person, and is waived by a voluntary general appearance.

Same—Pleading.—When a cause has been revived by conditional order duly made absolute, it is not essential that amended or supplemental pleadings be filed alleging the capacity of the new party, as such averments would not be traversable, and the fact already appears of record.

Same—Same.—For the same reason it is proper to refuse the adverse party leave, by supplemental pleadings, to tender an issue based on the matter of revivor.

Comparative Negligence.*—The doctrine of comparative negligence has no place in the jurisprudence of this state. It is therefore error to instruct the jury that plaintiff may recover, although guilty of contributory negligence, provided the negligence of defendant was gross, and that of plaintiff slight in comparison.

Instructions.—A positive misstatement of the law in an instruction is not cured by a further correct statement in conflict with the first.

Expert Testimony.—Expert testimony is incompetent where the subject of inquiry is of such a character as to be within the knowledge of men of common education and experience, and to call for no special skill, knowledge, or experience.

Same.—A hypothetical question should not be permitted when it only in part calls for the exercise of special skill or knowledge, and for the rest asks the witness to base his opinion on matters within the ordinary experience of men.

(Syllabus by the Court.)

ERROR by defendant to Cass county district court. *Reversed.*

B. P. Waggoner, *James W. Orr*, *A. N. Sullivan*, and *C. S. Polk*, for plaintiff in error.

Matthew Gering, for defendant in error.

*See *notes*, 11 Am. & Eng. R. Cas., N. S., 842 *et seq.*

HARDING

v.

LYNN & B. R. Co.

(*Supreme Judicial Court of Massachusetts.*)

Injury to Employer—Railroad Companies—Notice to Common Officer.*—It appeared from the sheriff's return that the notice, instead of being served upon the defendant railroad company, was served upon a railroad company whose road had been leased by defendant, by delivering a copy thereof to B., its president, who was also defendant's president. *Held*, that such notice was not notice to defendant.

EXCEPTIONS by plaintiff from Suffolk county superior court. *Exceptions overruled.*

Marcellus Coggan and *E. S. Page*, for plaintiff.
Lincoln & Badger, for defendant.

NOTE.

Service upon Common Agent.—Issuance of process against a corporation does not begin a suit against another, although service is made upon a common agent of both. Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

GRAND TRUNK RY. CO.

v.

CENTRAL VERMONT R. CO.

(*Circuit Court, D. Vermont, Oct. 22, 1898.*)

Insolvency—Car Rentals—Preferential Claims.*—A claim for car mileage accruing prior to a receivership is not a preferential claim.

Fred H. Williams, for petitioner.
Charles M. Wilds and *Elmer P. Howe*, for petitionees.

WHEELER, District Judge, delivering the opinion, said: "The supreme court of the United States said in Thomas *v.* Car Co., 149 U. S. 95, 13 Sup. Ct. 824, after reviewing prior cases: 'Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership cannot be maintained, but should have been disallowed.'

"In Pullman's Palace-Car Co. *v.* American Loan & Trust Co., 28 C. C. 263, 84 Fed. 18, the circuit court of appeals of

*See note at end of case.

the Eighth circuit said: 'Notwithstanding the ingenious and able arguments of counsel for appellant, we are unable to perceive in this case other than an effort to establish as a preferential debt a claim for the stipulated compensation for the use of cars, or, as it is generally called, 'car rental.' Under the authority of Thomas *v.* Car Co., 149 U. S. 95, 13 Sup. Ct. 824, this cannot be done.'

"In Virginia & A. Coal Co. *v.* Central Railroad & Banking Co., 170 U. S. 355, 18 Sup. Ct. 657, the court said: 'In concluding that the claims of the interveners were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in the Kneeland Case, 136 U. S. 89, 10 Sup. Ct. 950, and the Thomas Case, 149 U. S. 95, 13 Sup. Ct. 824, as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims accruing prior to a receivership.'

"These decisions and declarations seem to preclude the allowance of these car rentals or mileages as preferred claims in this case.' "

NOTE.

Preference of Claim for Car Rental.—Where a car company leases cars to a railroad company at a certain fixed rental, a claim for such rental before the beginning of foreclosure proceedings and the appointment of a receiver does not constitute a lien in preference to a mortgage debt. Thomas *v.* Western Car Co., 149 U. S. 95, 13 Sup. Ct. Rep. 824.

CITY OF JOHNSON CITY

v.

CHARLESTON C. & C. R. CO. *et al.*

(*Supreme Court of Tennessee, Feb. 11, 1897.*)

City as Subscriber to Railroad Stock—Payment in Municipal Bonds—Validity of Issue—Constitutional Law.—The act of a municipality in issuing bonds in payment of its subscription to the capital stock of a railroad company is not a giving or loaning of credit within the meaning of the constitution of Tennessee, which provides that the assent of three fourths of the votes cast at an election held by the qualified voters of a municipality shall be a

condition precedent to the validity of a giving or loaning of the credit of such municipality.

Same—Innocent Holders—Estoppel.*—Where such bonds recite upon their face that they are issued under an act which only permits a city to become a stockholder in railroad companies incorporated under the laws of the state, their issue to a foreign railroad company is invalid, and the city is not estopped, even as against *bona fide* holders without notice, from denying its own authority to subscribe to such stock and to issue such bonds.

Same—Findings of Fact—Review.—Findings of fact by the court of chancery appeals are conclusive.

Same—Foreign Corporations.—Under the laws of Tennessee no city has power to make a subscription and issue bonds to a foreign corporation.

APPEAL by both parties from court of chancery appeals. *Affirmed.*

Isaac Harr and *Burrow Bros.*, for complainants.

E. C. Reeves, *H. H. Carr*, and *Webb & McClung*, for defendants.

CALDWELL, J., in delivering the opinion of the court, said: "The bonds recite upon their face that they were issued pursuant to and in accordance with the provisions of the act herein considered, which implies, among other things, that they were issued to 'a railroad company incorporated under the general laws' of the state, since such bonds could rightfully be issued under that act to no company not so incorporated. This recital estopped the city, in a litigation with innocent holders of the bonds, from denying any recited or implied fact which the enactment made it the duty of the city board to ascertain, determine, and certify, originally and independently of any public record to which such holders might have had access. It did not estop the city in such a case, however, from disputing the existence of any fact which its board was not by the enactment required to decide in the first instance, or which was to be determined by some other authority or from some record accessible to the public. Such are the affirmative and the negative sides of the rule deducible from the decisions. Sutliff *v.* County Com'rs, 147 U. S. 238, 13 Sup. Ct. 318; Citizens' Sav. & Loan Ass'n *v.* Perry Co., 156 U. S. 709, 15 Sup. Ct. 547; Chaffee Co. *v.* Potter, 142 U. S. 355, 12 Sup. Ct. 216; Dixon Co. *v.* Field, 111 U. S. 83, 4 Sup. Ct. 315; Northern Bank

*See note at end of case.

of Toledo *v.* Porter Tp. Trustees, 110 U. S. 608, 4 Sup. Ct. 254; Sherman Co. *v.* Simons, 109 U. S. 735, 3 Sup. Ct. 502; Buchanan *v.* Litchfield, 102 U. S. 278; Anthony *v.* Jasper Co., 101 U. S. 693; Marcy *v.* Oswego Tp., 92 U. S. 637; Town of Coloma *v.* Eaves, Id. 484; Humbolt Tp. *v.* Long, Id. 642; Board of Com'rs *v.* Aspinwall, 21 How. 539; Coffin *v.* Commissioners, 6 C. C. A. 288, 57 Fed. 137."

NOTE.

Municipal Bonds in Aid of Railroads—Recitals—Estoppel.—Where by the recitals in railroad aid bonds the performance of any conditions precedent to the validity of the bond are set forth, the municipality is estopped to deny the truth of such recitals as against a *bona fide* holder for value. It is not, however, in any case estopped to set up lack of legislative authority to issue the bonds. The following are the leading authorities: Knox Co. *v.* Aspinwall, 21 How. 439; Moran *v.* Miami Co., 2 Black. 722; Supervisors *v.* Schenck, 5 Wall. 772; Rogers *v.* Burlington, 3 Wall. 654; Woods *v.* Lawrence Co., 1 Black. 386; Mercer Co. *v.* Harket, 1 Wall. 83; Meyer *v.* Muscatine, 1 Wall. 385; Bissell *v.* Jeffersonville, 24 How. 287; Gelpcke *v.* Dubuque, 1 Wall. 175; Pendleton Co. *v.* Amy, 18 Wall. 297; St. Joseph Township *v.* Rogers, 16 Wall. 644; Grand Chute *v.* Winegar, 15 Wall. 572; Coloma *v.* Eaves, 92 U.S. 484; Randolph Co. *v.* Post, 93 U. S. 502; Leavenworth Co. *v.* Barnes, 94 U. S. 70; Douglass Co. *v.* Bolles, 94 U. S. 104; Commis. of Johnson Co. *v.* Thayer, 94 U. S. 631; Cass Co. *v.* Johnson, 95 U. S. 360; Daveiss Co. *v.* Hudekoper, 98 U. S. 98; Nauvoo *v.* Ritter, 97 U. S. 389; Venice *v.* Murdock, 92 U. S. 494; Anthony *v.* Gasper Co., 101 U. S. 693; Warren *v.* Marcy, 97 U. S. 96; Harkett *v.* Ottawa, 99 U. S. 66; San Antonio *v.* Mehaffey, 96 U. S. 312; Lyons *v.* Munson, 99 U. S. 684; Supervisors *v.* Galbraith, 99 U. S. 212; Menasha *v.* Hazard, 101 U. S. 126; s. c., 2 Am. & Eng. R. Cas. 571; Pompton *v.* Cooper Union, 101 U. S. 196; Douglass *v.* Pike Co., 101 U. S. 677; Darlington *v.* Jackson Co., 101 U. S. 688; Foote *v.* Pike Co., 101 U. S. 688; Roberts *v.* Bolles, 101 U. S. 119; Dodge *v.* Platte Co., 2 Am. & Eng. R. Cas. 583; Bonham *v.* Needles, 2 Am. & Eng. R. Cas. 642; Walnut *v.* Wade, 3 Am. & Eng. R. Cas. 36; Hopper *v.* Covington, 4 Am. & Eng. R. Cas. 251; Cagwin *v.* Hancock, 5 Am. & Eng. R. Cas. 150; Clay Co. *v.* Society for Savings, 5 Am. & Eng. R. Cas. 170; Burr *v.* Charlton Co., 6 Am. & Eng. R. Cas. 584; Moultrie Co. *v.* Fairfield, 7 Am. & Eng. R. Cas. 194; Pana *v.* Bowler, 12 Am. & Eng. R. Cas. 563; American L. I. Co. *v.* Bruce, 12 Am. & Eng. R. Cas. 610; Lewis *v.* Commissioners of Barbour Co., 12 Am. & Eng. R. Cas. 615.

BURRUS *et al.*

v.

CITY OF COLUMBUS *et al.*

(*Supreme Court of Georgia, July 22, 1898.*)

Side Tracks in Streets—Abutters—Injunctions.*—Where a railway company, by an act of the general assembly, is duly authorized to construct and operate a side track of its railroad in a given street of a city, the fee to which street is in the state, a court of equity will not enjoin it from so doing, merely to prevent consequential damages to the property of a private citizen which is located upon such street.

Same.—Upon the hearing of an application for injunction to prevent alleged irreparable injury, it is not erroneous to refuse to grant the same, when neither the petition nor the evidence sets forth facts sufficient to enable the court to determine the necessity for an injunction.

(Syllabus by the Court.)

ERROR by plaintiff from Muscogee county superior court *Affirmed.*

C. J. Thorton and *E. A. Thorton*, for plaintiffs in error.

Jno. D. Little, *F. D. Peabody*, and *C. E. Battle*, for defendants in error.

CENTRAL TRUST CO. OF NEW YORK

v.

CHATTANOOGA, R. & C. R. R. *et al.* (OWENS *et al.*, INTERVENERS.)

(*Circuit Court, N. D. Georgia, September 14, 1898.*)

Railroad Mortgages—After Acquired Property.†—A deed of trust covering a line of railway commencing and ending at designated points, includes portions of the road between such points constructed after the deed was executed.

Same—Right to Earnings During Receivership.—The terms of a deed of trust provided that the bondholders secured thereby might, upon default in payment of interest, take possession of the franchises

*See Bond *v.* Pennsylvania Co. (Ill.), 10 Am. & Eng. R. Cas., N. S., 118, and *notes*, p. 126; Taylor *v.* Portsmouth, K. & Y. St. Ry. Co. (Me.), 10 *Ibid*, 215, and *note*, p. 221.

†See note at end of case.

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and privileges of said railroad and operate it. Such default having occurred, at the instance of said bondholders, a receiver was appointed who after operating the road for a time sold it under foreclosure. *Held*, that judgment creditors, though their judgments were prior in date to a deficiency judgment given to the bondholders for the amount due on their bonds above the amount realized from the sale of the road, could not intervene and divert the net earnings of the road during the receivership to the payment of their judgment before the deficiency judgment was satisfied.

Halstead Smith and *Dean & Dean*, for interveners.
King & Spaulding, for defendant.

NOTES.

Railroad Mortgages—After Acquired Property.—At common law a mortgage of after acquired property is void and of no effect. Jones *v.* Richardson, 10 Met. (Mass.) 481; Bonsey *v.* Amee, 8 Pick. (Mass.) 236; Letourno *v.* Ringgold, 3 Cranch (C. C.) 103; Gardner *v.* Macewen, 19 N. Y. 123; Chapin *v.* Cram, 40 Me. 561; Pierce *v.* Emery, 32 N. H. 484; Hunt *v.* Bullock, 23 Ill. 320; Looker *v.* Pockwell, 38 N. J. L. 253; Wilson *v.* Wilson, 37 Md. 1; Hunter *v.* Bostworth, 43 Wis. 583; Williams *v.* Broggs, 11 R. I. 476.

But in equity a different rule prevails, and mortgages by railroad companies of after acquired property are valid, the proposition that a railroad company has such power being almost universally supported by both English and American authorities. Holroyd *v.* Marshall, 10 H. L. Cas. 191; Mitchell *v.* Winslow, 2 Story (U. S.) 630; Pennoch *v.* Coe, 23 How. (U. S.) 117; Barnard *v.* Norwich, etc., R. Co., 2 Low. (U. S.) 608; Brett *v.* Carter, 2 Low. (U. S.) 458; Dillon *v.* Barnard, 1 Holmes (U. S.) 368; Butler *v.* Rahm, 46 Md. 541; Williamson *v.* New Jersey S. R. Co., 29 N. J. Eq. 311; Cook *v.* Corthell, 11 R. I. 482; Morrill *v.* Noyes, 56 Me. 458; Wilmington, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366; Emerson *v.* European, etc., R. Co., 67 Me. 387; Bell *v.* R. Co., 34 La. Ann. 785; Parker *v.* New Orleans, etc., R. Co., 33 Fed. Rep. 693; Boston S. D. & T. Co. *v.* Bankers', etc., Tel. Co., 36 Fed. Rep. 288; Nichols *v.* Mase, 94 N. Y. 160; 17 Am. & Eng. R. Cas. 230; Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 33 Am. & Eng. R. Cas. 46; Shaw *v.* Bill, 95 U. S. 10; Calhoun *v.* Memphis, etc., R. Co., 2 Flip. (U. S.) 442.

This principle of law is of comparatively recent origin. It is first clearly and definitely stated by Story in Mitchell *v.* Winslow, 2 Story (U. S.) 638, which was decided in 1843. "Here," said Story, "the true question is not whether the assignment of the property to be acquired in future is good at law, but whether it is good in equity. Upon the best consideration which I am able to give the subject, I

think it is good and valid." Other decisions to the same effect speedily followed, and at length, as early as 1859, the principle received the sanction of the Supreme Court of the United States, in Pennock *v.* Coe, 23 How. (U. S.) 117; See also Philadelphia, etc., R. Co., 3 Phila. (Pa.) 173; Butler *v.* Rahm, 46 Md. 541; Williamson *v.* New Jersey, etc., R. Co., 29 N. J. Eq. 311; Scott *v.* Canton, 6 Biss. (U. S.) 529; Brett *v.* Carter, 2 Low. (U. S.) 458; Dillon *v.* Barnard, 1 Holmes (U. S.) 386; Emerson *v.* European, etc., R. Co., 67 Me. 387; Stevens *v.* Watson, 4 Abb. App. Dec. (N. Y.) 302; Barnard *v.* Norwich, etc., R. Co., 4 Cliff. (U. S.) 351; Willenock *v.* Morris Canal Co., 3 Green Ch. 377; Pierce *v.* Emery, 32 N. H. 484; Ludlow *v.* Hurd, 6 Am. Law Reg. 493.

In *England* the same conclusion was not so early reached. Several authorities pointed to such a result, but it was not until the decision of the case of Holroyd *v.* Marshall that the law was deemed settled. In this case a decree was entered by Vice-Chancellor Stuart, affirming the validity of the mortgage. On appeal to the House of Lords that decree was reversed by L. C. Campbell, 2 De G. F. & S. 596. A reargument was, however, ordered, and in 1862 a decree reversing LORD CAMPBELL was entered.

In *Louisiana* the execution of a mortgage by a railroad company does not extend to property acquired after the date of the mortgage. State *v.* New Orleans, etc., R. Co., 4 Rob. (La.) 231; State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513. See 2 Rev. Code 1870, art. 3308.

Any authority given to a railroad company to mortgage the whole or part of its road implies the right to mortgage its after acquired property. Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537; Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Hamlin *v.* European, etc., R. Co., 72 Me. 83.

In Covey *v.* Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173, AGNEW, P. J., said: "To build a railroad requires a vast capital beyond ordinary means, and to borrow it, 'to carry into effect the objects of the corporation,' demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and equips the road; and slender indeed would his security be which extends not beyond the worn-out rails and rolling stock and equipment first in use, and these, indeed, not often in being at the time of the execution of the mortgage. In giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent in order to carry into effect the objects of the incorporation."

Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must trans-

pire before the bonds become due, it must depend upon the implied covenant of the company to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and eventually indemnify the creditors for the principal debt. Ludlow *v.* Hurd, 1 Disney (Ohio) 552.

Same—Priority of Equities Arising Subsequently.—See 4 Am. & Eng. R. Cas., N. S., 173, *note*; Farmers' L. & T. Co. *v.* Northern Pac. R. Co. (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 81; Veatch *v.* American L. & T. Co. (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 795.

GUARANTEE TRUST & SAFE-DEPOSIT CO.

v.

PHILADELPHIA, R. & N. E. R. CO.

(*Supreme Court of Errors of Connecticut, Nov. 3, 1897.*)

Receivers—Orders Fixing Wages of Employees—Right of Appeal.—Appeal lies from an order of court, made in response to a petition by employees, directing a railroad receiver to restore the schedule of wages existing at the time of his appointment, such order being a final adjudication of the rights of parties involved in judicial proceedings of an adversary nature.

Authority of Receiver in Foreign State—Rule of Comity.*—An order of court directing a railroad receiver to pay employees a certain rate of wages is not void for want of jurisdiction simply because a portion of the road extends into another state, as the court may rely for its full enforcement upon the rule of comity which influences the courts of one state to recognize in many ways the authority of receivers appointed by the courts of another state.

Same.—Where a railroad extends from one state into another, and the same person is appointed its receiver by the courts of both states, an order of court directing such receiver to restore a schedule of wages under which he had operated the entire road for the four preceding years is not void upon the ground that it conflicts with the business of the road within the jurisdiction of the court of the foreign state.

Same.—And the fact that the court appointed such receiver in merely ancillary proceedings after he had been appointed in the foreign state does not necessarily effect the validity of the order.

APPEAL by receiver from Hartford county superior court. *Affirmed.*

*See note at end of case.

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Arthur L. Shipman and *Charles E. Gross*, for appellant.

John R. Buck and *Arthur F. Eggleston*, for employees of the Philadelphia, Reading & New England Railroad Company.

HAMERSLEY, J. in delivering the opinion of the court, said: "In matters of management in respect to a property impracticable or difficult to be managed otherwise than as a whole, the direction of the court of initial proceeding, establishing rules which of necessity must apply to the whole property, will ordinarily be followed by the courts appointing the same receiver in other states. But while the court in New York, as the court of initial proceeding, is presumptively the proper court to direct as to the wages of employees whose services are rendered as a whole in both states, nevertheless it is possible that the interests of the property may require and the nature of the proceedings in both courts justify the direction of the Connecticut court as to the wages of these employees, and such is the condition shown by this record. If the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment. Schlesinger *v.* Chapman, 52 Conn. 271; Rogers *v.* Rogers, 53 Conn. 121, 150, 1 Atl. 807, and 5 Atl. 675."

NOTE.

Foreign Receivers—Comity.—Where the rights of suitors in the local courts are not involved, comity requires that receivers appointed in one state shall be permitted in another state to protect rights and enforce claims relating to the property of which they were appointed to take charge. Hunt *v.* Columbian Ins. Co., 55 Me. 297, 92 Am. Dec. 596. See also Boulware *v.* Davis, 90 Ala. 207, Lawy. Rep. Ann. 603, *note* in 6 Am. St. Rep. 185; Bank *v.* McLeod, 38 Ohio St. 183, fully discussing subject. Hind *v.* Elizabeth, 41 N. J. L. 2; also explaining principle and drawing distinctions; Runk *v.* St. John, 29 Barb. (N. Y.) 587; *Ex parte* Norwood, 3 Biss. (U. S.) 511; Pond *v.* Cooke, 45 Conn. 130, 29 Am. Rep. 672; Davis *v.* Gray, 16 Wall. (U. S.) 219; Graydon *v.* Church, 7 Mich. 50; Pugh *v.* Hurtt, 52 How. Pr. (N. Y.) 24; Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 31.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO.

v.

NORFOLK & W. R. CO.

(*Circuit Court, W. D. Virginia, July 2, 1898.*)

Foreclosure Sale—Liability for Negligence Pending Delivery to Purchaser.—During the interim between the execution and delivery

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of the deed of conveyance and the delivery of possession of railroad property to the purchaser at a foreclosure sale, the receiver, as such, is responsible for negligence in the operation of the road, and not the purchaser, although the decree of sale provides that "the purchaser shall, as part consideration for the railroad property and franchises purchased, * * * pay, ratify and discharge * * * (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers before delivery of possession of the property sold, in the management, operation, use, or preservation thereof."

Same—Jurisdiction.—And where it is contended that the purchaser is liable for such negligence, the federal court decreeing the sale has jurisdiction to prevent an attempt to establish a claim on account of such negligence in a state court.

Sipe & Harris and *E. M. Pendleton*, for petitioner.
William A. Anderson and *C. B. Guyer*, for respondent.

STATE
v.
MANCHESTER & L. R. R.

(*Supreme Court of New Hampshire, March 12, 1897.*)

Payment of Excess of Profits to State—Constitutionality of Law.*—The law of New Hampshire which provides that when the net receipts of a railroad corporation shall be found to exceed the average of ten per cent. on its expenditure from the commencement of its operations, the excess shall be paid into the state treasury until otherwise disposed of by the legislature, is constitutional, though applying to railroad corporations only.

Same—Collection—Remedy.—An action to recover such excess is in effect, an action of debt or covenant to recover money received by defendant for the use of the state.

Demurrer to declaration *overruled*.

E. G. Eastman, Atty. Gen., for the State.
Worcester, Gafney & Snow and *O. E. Branch*, for defendants.

CARPENTER, C. J., in delivering the opinion of the court, said: "The fifth section of the defendants' charter provides 'that in any and every year when the net receipts from the use of said road shall exceed the average of ten per cent. per annum from the commencement of their operations, the

*See notes at end of case.

excess shall be paid into the treasury of the state until otherwise ordered by the legislature.' Priv. Laws 1847, c. 549. This clause of the defendants' charter is identical with the general railroad law of 1844 (Laws 1844, c. 128, § 11), and was superfluous. Opinion of the Justices, 63 N. H. 629, 671—673, 33 Atl. 1076. The general law and the charter imposed on the defendants no duty which they did not directly and voluntarily assume. They presented to the defendants a proposition which they were at liberty to accept or to reject. The defendants accepted the charter subject to the burdens by it imposed. The provision that they should pay to the state the excess above 10 per cent. was a qualification of, or burden imposed upon, the franchise granted them, exactly like the various other duties required of them, as, for example, in case their road should cross any canal, turnpike, or other highway, to so construct it as not to 'obstruct the safe and convenient use of such canal, turnpike or other highway,' and to maintain in good repair all bridges 'they may construct for the purposes of conducting their railroad over any canal, turnpike or other highway, or any private way, or for conducting such private way, turnpike or other highway over said railroad.' Charter, §§ 11, 13. The limitation of their income to 10 per cent. was no more a tax upon their property than were the various obligations imposed upon them. It and they alike were burdens upon the granted franchises, diminishing their value, and to be considered in assessing the value of the defendants' property for the purpose of taxation, or under the law of eminent domain. The objection that the provision of the charter, as well as the general law, violates the principle of uniformity and equality, has no foundation in fact. All railroad corporations in the state, by virtue of the express provision of their charters or of the general law, are subject to the same obligation. The law applies uniformly and equally to all railroads. It is said, however, that it does not apply to other corporations, and therefore is unequal. But this is not an unconstitutional discrimination. It might as well be claimed that laws regulating the business of dentists (Pub. St. c. 134) are unconstitutional because they do not apply to farmers."

NOTES.

Uniformity and Equality in Taxation.—The division of things taxable into classes, and the imposition of taxes which bear equally

upon the members of each class, is not repugnant to the rule requiring uniformity and equality in taxation even though such taxes bear unequally upon the different classes. New Orleans *v.* People's Bank, 32 La. Ann. 84, Ann. 398 : State *v.* Ogden, 10 La. Ann. 402; Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; People *v.* Henderson, 12 Colo. 369 ; Coal Run Coal Co. *v.* Finlen, 124 Ill. 666 ; Hunsaker *v.* Wright, 30 Ill. 146 ; Sterling Gas. Co. *v.* Higby, 134 Ill. 557 ; Levy *v.* Smith, 4 Fla. 154 ; Fletcher *v.* Oliver, 25 Ark. 289 ; American Union Express Co. *v.* St. Joseph, 66 Mo. 675 ; St. Louis *v.* Freivogel, 95 Mo. 533; Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, Banger's Appeal, 109 Pa. St. 79 ; Com. *v.* Germania Brewing Co., 145 Pa. St. 83 ; Hammett *v.* Philadelphia, 65 Pa. St. 146 ; Weber *v.* Reinhard, 73 Pa. St. 370 ; Kneeland *v.* Milwaukee, 15 Wis. 454 ; Dean *v.* Gleason, 16 Wis. 1 ; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37 ; State *v.* Mann, 76 Wis. 469 ; London *v.* Wilmington, 78 N. Car. 109 ; Stratton *v.* Collins, 43 N. J. L. 562 ; State *v.* Parker, 32 N. J. L. 435 ; State *v.* Underground Cable Co. (N. J. 1889), 18 Atl. Rep. 581 ; State *v.* Richards, 52 N. J. L. 156 ; State Board *v.* Central R. Co., 48 N. J. L. 146, State Railroad Tax Cases, 92 U. S. 575 ; Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121, Kentucky Railroad Tax Cases, 115 U. S. 322 ; Gibbons *v.* District of Columbia, 116 U. S. 404 ; Davenport Nat. Bank *v.* Board of Equalization, 123 U. S. 83. And see Louisiana Cotton Mfg. Co. *v.* New Orleans, 31 La. Ann. 442 ; New Orleans *v.* Davidson, 30 La. Ann. 554 ; New Orleans *v.* Fourchy, 30 La. Ann. 910 ; Frontier Land, etc., Co. *v.* Baldwin, 3 Wyoming 764 ; State *v.* Western Union Tel. Co., 73 Me. 518 ; Pacific Express Co. *v.* Seibert, 44 Fed. Rep. 310, 142 U. S. 339.

And corporations engaged in different kinds of business may, for the purpose of taxation, be placed in different classes. Weaver *v.* State, 89 Ga. 639 ; Com. *v.* Germania Brewing Co., 145 Pa. St. 83 ; Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121 ; Pacific Express Co. *v.* Seibert, 142 U. S. 339 ; State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463 ; La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27 ; Ottawa Gas Light, etc., Co. *v.* Downey, 127 Ill. 201 ; Coal Run Coal Co. *v.* Finlen, 124 Ill. 666. And see, Ducat *v.* Chicago, 48 Ill. 173.

Same—Constitutional Provisions.—As to the general construction placed upon the provisions in the State constitutions requiring an equal and uniform rule of taxation, see the following cases : McGehee *v.* Mathis, 21 Ark. 40 ; Poeple *v.* McCreery, 34 Cal. 432 ; State *v.* Lathrop, 10 La. Ann. 398 ; Hamilton *v.* St. Louis Co. Ct., 15 Mo. 3 ; State *v.* Warren Co., 17 Ohio St. 558. Slaughter *v.* Commonwealth, 13 Gratt. 767 ; Knowlton *v.* Supervisors, 9 Wisc. 410 ; Cheshire *v.* Commissioners of Berkshire, 118 Mass. 386 ; Youngblood *v.* Sexton, 32 Mich. 406 ; State *v.* Maxwell, 27 La. Ann. 722 ; Ottawa Co. *v.*

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Nelson, 19 Kans. 234; Ex Parte Robinson, 12 N. C. 263; Gatlin *v.* Tarboro, 78 N. C. 119; East Portland *v.* Multnomah Co., 6 Oregon, 463; Dyer *v.* Osborne, 11 R. I. 321; Marsh *v.* Supervisors, 42 Wisc. 502; Kent *v.* Kentland, 62 Ind. 291; German Savings Bank *v.* Archbald, 15 Blatch. C. Ct. 398; St. Anna's Asylum *v.* New Orleans, 105 U. S. 362; State *v.* Collins, 43 N. J. L. 562.

ILLINOIS CENT. R. CO.

v.

LE BLANC.

(*Supreme Court of Mississippi, April 5, 1897.*)

Ejectment—Jurisdiction.—Actions of ejectment are within the jurisdiction of circuit courts under the provisions of the constitution of Mississippi, "matters civil" in the constitutional provision on such subject signifying matters of common law cognizance.

Same—Evidence.—Defendant in an action of ejectment cannot object to the admission of a deed in evidence merely upon the ground that it describes the land conveyed as a specified number of acres of the north, south, east, or west, part of a specified legal subdivision.

Same.—An assessment roll furnishing the clew which, when followed by the aid of other testimony, conducts certainly to the land intended is admissible as evidence in such action.

Effect of Decree.—A decree cancelling all interest, claim, or privilege of a railroad company in certain land is conclusive as to the company's right of way over such land.

Same—Tax Sales of Freehold—Ownership of Tracks Wrongfully Laid.*—Where land upon which there are railroad tracks was neither assessed nor sold as railroad property, nor for taxes due from the railroad company, but was assessed and sold under the general statutes on the subject of the assessment and sale of lands for taxes, title to such tracks did not pass from the railroad company by virtue of such tax sale or under a decree cancelling its interest in the land itself.

APPEAL by defendant from Pike county circuit court. *Affirmed.*

J. A. P. Campbell, Mayes & Harris, and *R. H. Thompson*, for appellant.

Cassedy & Cassedy and *J. H. Price*, for appellee.

*See Charleston & W. C. Ry. Co. *et al. v.* Hughes *et al.* (Ga.), 11 Am. & Eng. R. Cas., N. S., 541, and *notes*, 569, *et seq.*

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WILLING, S. J., in delivering the opinion of the court, said: "It is contended by appellant's counsel: (1) That the deeds relied on by the appellee and the chancery decree did not convey, and could not convey, the railroad track or right of way or fee under the same, the property being of such a nature that it is legally impossible for a tax title by sheriff's sale under the general statutes to be acquired thereto. (2) That the deeds relied on and the chancery decree carried, and could only carry, the fee in the land; and that neither the railroad's easement over the same nor its superstructure—because of public policy, said property being affected with a public use—were carried. It is argued in support of this contention that under the Code of 1880 (sections 597 to 608, inclusive) there was a special arrangement for the assessment and collection of taxes on railroad property, entirely different from the provisions of the Code for the assessment and collection of taxes on other property; and, as this was an ordinary tax sale of the land on which appellee's railroad was situated, the appellee acquired no title either to appellee's right of way or superstructure by virtue of the tax deed of the decree confirming the same. We will not go into a discussion of the question as to the validity of the tax sale, nor as to whether appellant's right of way over these lands passes by that sale. An easement in lands is an interest in lands. 6 Am. & Eng. Enc. Law, p. 143. The appellee in the chancery court by his cross bill sought not only to have his title established, but to have all clouds removed therefrom, and the decree not only confirms his title, but cancels all interest, claim, or privilege the appellant had in or to the same. The decree is conclusive as to the right of way. Did the superstructure the appellant had placed on the land pass by the tax sale to the purchasers, and is the appellant concluded by the decree as to it? This court and the courts of Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, Alabama, Florida, Texas, and other states have held that the general rule as to things affixed to the freehold by a trespasser or a person entering tortiously is not applicable as against a body having the power of eminent domain, and entering without leave, and making improvements for the public purpose for which it was created and given such power. In Railway Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271, the court says: 'The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply

to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property.' This case is cited by this court with approval in Railway Co. *v.* Dickson, 63 Miss. 380. Delivering the opinion of the court, JUDGE CAMPBELL says: 'The railroad company was a trespasser in constructing its road upon land over which it had not acquired the right of way; but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of the due compensation. The continuing right of the company to secure the right of way in accordance with its charter, and the nature of its entry on the land, and annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold; and the rule of the common law, established when railroads were unknown, does not apply.' In Daniels *v.* Railroad Co., 35 Iowa, 129, where, after a recovery in ejectment by the owner of the land, and the railroad company instituted condemnation proceedings, the court held that the value of the improvements put on the land by the railroad company were not to be considered in assessing the damages. In Justice *v.* Railroad Co., 87 Pa. St. 28, there had been a judgment in ejectment in favor of the landowner, and the court held that the recovery did not include the chattels put upon the land by the company and the structures they compose. To the same effect are Jones *v.* Railway Co., 70 Ala. 227, and Railway Co. *v.* Adams, 28 Fla. 631, 10 South. 465, where the mandate was withheld by the supreme court for a reasonable time to allow the railroad company to institute condemnation proceedings. The land in this case was neither assessed nor sold as railroad property, nor for taxes due from the railroad company, but was assessed and sold under the general statutes on the subject of the assessment and sale of lands for taxes. Under our view, the title to the chattels put upon the land by the appellant and the structures under them was not vested in the appellee either under the tax sale or the

chancery decree, and was not included in his recovery in this case. The judgment of the circuit court is affirmed, but the mandate will be withheld a reasonable length of time to enable the appellant to institute and prosecute new condemnation proceedings to acquire a right of way over the lands. 7 Enc. Pl. & Prac. p. 705; Railway Co. *v.* Adams, 28 Fla. 631, 10 South. 465."

MISSOURI, K. & T. RY. CO.

v.

SHOCKMAN.

(*Supreme Court of Kansas, March 5, 1898.*)

Injury to Child on Track—Negligence—Allegations—Proof—Findings—Fatal Variance.*—In an action against a railroad company for personal injuries, plaintiff's petition alleged that the negligence of the company consisted in placing its engine in charge of a one-eyed, and otherwise incompetent engineer; and that its conductor and brakeman were negligent in leaving the engine solely to the care of such engineer, whom they knew to be incompetent; that the injury was the result of the negligence of those in charge while running defendant's engine and trains within a populous part of a city; and alleged in conclusion that the injury resulted from the blindness, and incompetency of the engineer, and the negligent manner in which he operated such engine and cars. Plaintiff's evidence was principally directed to prove that the engineer was not furnished with proper assistance to keep a lookout from the engine. The jury did not find the engineer personally negligent or incompetent, but found that the accident resulted through the fault of the company in not furnishing the engineer with proper assistants. *Held*, that there was a fatal variance between the charge of negligence contained in plaintiff's petition and in plaintiff's proof and the jury's findings in regard to negligence, plaintiff's general charge of negligence not sufficiently covering the evidence offered and the findings of the jury.

ERROR by defendant from Montgomery county district court. *Reversed and remanded.*

T. N. Sedgwick, for plaintiff in error.

H. C. Dooley, *J. H. Keith* and *C. B. Graves*, for defendant in error.

*See Chicago & E. I. R. Co. *v.* Driscoll (Ill.), 12 Am. & Eng. R. Cas., N. S., 644, and *note*, p. 653.

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Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 722.

Speed in excess of ordinance does not affect contributory negligence in failing to stop, look and listen at private crossing.
Vant *v.* Chicago & N. W. Ry. Co. (Wis.), 470.

Where one injured by colliding with street-car was guilty of contributory negligence, there can be no recovery.
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Child asleep on track at crossing.
Krenzer *v.* Pittsburgh, C., C. & St. L. Ry. Co. (Ind.), 343.
Child injured while sleeping on track at crossing cannot recover although company was negligent, unless such negligence was wilful or wanton.
Krenzer *v.* Pittsburgh, C., C. & St. L. Ry. Co. (Ind.), 343.
Contributory Negligence.
Person standing on track waiting for train to pass killed by another section backing without warning, question of his contributory negligence is for jury.
Williams *v.* Atchison, T. & S. F. R. Co. (Kan.), 370.
Crossing before moving train is such contributory negligence as to prevent recovery for death caused thereby, even though the company was negligent as to signals and flagman.
Hanson *et al. v.* Pennsylvania R. Co. (N. J.), 404.
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Cox *v.* Norfolk & C. R. Co. (N. Car.), 390.
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Missouri Pac. Ry. Co. *v.* Moffatt *et al.* (Kan.), 397.
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Evidence of custom of other companies as to equipment of switch-yards not admissible.
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Missouri, K. & T. Ry. Co. *v.* Medaris (Kan.), 698.
Existence of relation of fellow servants is question of fact.
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In action by baggage master to recover for injuries alleged to have been caused by engineer's negligence, petition need not allege that they are not fellow servants.
Chicago & A. Ry. Co. *v.* Swan (Ill.), 674.

Master not liable for injury caused by negligence of.
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Negligence of fellow servant concurring does relieve master where his negligence was proximate cause.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 782.

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Chicago & E. I. R. Co. *v.* Driscoll (Ill.), 644.

To recover for injuries occasioned by negligence of fellow servant, plaintiff must have been free from negligence.
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Baggage master and engineer not fellow servants.
Chicago & A. Ry. Co. *v.* Swan (Ill.), 675.

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Foreman of wiper gang fellow servant of hands in gang.
Knot *v.* Southern Ry. Co. (Tenn.), 684.

Switching crews in same employment.
Chicago & E. I. R. Co. *v.* Driscoll (Ill.), 644.
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Whether brakeman is fellow servant of fireman is question for jury.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 781.

FIRES SET BY ENGINES.

Evidence of other fires.
Galveston, H. & S. A. Ry. Co. *v.* Hertzig (Tex. Civ. App.), 846.

Evidence that defendant has paid damages for injuries to other property caused by same fire.
Galveston, H. & S. A. Ry. Co. *v.* Hertzig (Tex. Civ. App.), 846.

Negligence of company essential under Ohio statute.
Continental Trust Co. *v.* Toledo, St. L. & R. C. R. Co. (C. C.), 854.

Proof of particular facts constituting negligence not necessary under Illinois statute.
Chicago & A. R. Co. *v.* Glenny *et al.* (Ill.), 839.

Subrogation of insurer.
Chicago & A. R. Co. *v.* Glenny (Ill.), 839.

Where the fact that engine causing the fire passed along defendant's road is undisputed,

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no error is committed in assuming such to be the case in instructing the jury.
Chicago & A. R. Co. *v.* Glenny *et al.* (Ill.), 839.

FIXTURES.
Tracks of railroad company do not pass with land sold at tax sale for taxes due by landowner.
Illinois Cent. R. Co. *v.* Le Blanc (Miss.), 877.

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ILLEGAL ARREST.
Carrier not liable for arrest made by employee beyond scope of employment.
Penny *v.* New York Cent. & H. R. R. Co. (N. Y.), 180.
Passenger illegally arrested for riding beyond destination not entitled to punitive damages.
Cone *v.* Central R. Co. (N. J.), 278.

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Admissions of counsel.
Central of Ga. Ry. Co. *v.* Johnston (Ga.), 286.
Assumption of risk must not be ignored in charging jury where there is evidence tending to establish it, and error in so doing is not cured by another paragraph in regard thereto.
Quinn *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 512.
Care required to be exercised in order to escape imputation of contributory negligence.
Omaha St. Ry. Co. *v.* Emminger (Neb.), 188.
Damages in action for carrying passenger beyond station.
Southern Ry. Co. *v.* Bryant (Ga.), 159.
Definition of gross negligence not properly given when it is not involved in case.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 782.

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Duty of company as to ballasting tracks.
Lake Erie & W. R. Co. *v.* Morrissey (Ill.), 624.

Erroneous charge as to lack of corroboration of testimony not cured by doubtful instruction.
Weiss *v.* Bethlehem Iron Co. (C. C. A.), 305.

Erroneous instruction as to burden of proof.
Morbey *v.* Chicago & N. W. Ry. Co. (Iowa), 687.

Error to refuse to instruct as to certain alleged contributory negligence which has been pleaded and as to which evidence has been introduced, and which, if established, is a complete defense to certain alleged negligence on defendant's part.
Louisiana Western Extension Ry. Co *et al. v.* Carstens *et al.* (Tex. Civ. App.), 781.

In action by servant to recover for personal injuries caused by obstruction on track, refusal to instruct that servant assumed the risk of such accident not error.
Galveston, H. & H. R. Co. *v.* Bohan (Tex.), 492.

In action for death at crossing it is proper to refuse instruction requiring that deceased should have exercised all the care and caution.
Louisville & N. R. Co. *v.* Clark's Adm'r (Ky.), 407.

In action for death of employee, risks assumed need not be specified.
Augusta Southern R. Co. *v.* McDade (Ga.), 548.

Inaccurate instruction as to measure of damages not prejudicial where verdict is not excessive.
Louisville Southern Ry Co. *et al. v.* Tucker's Adm'r (Ky.), 805.

Instruction as to presumption of negligence under Georgia statute.
Augusta Southern R. Co. *v.* McDade (Ga.), 549.

Instructions as to questions not raised by pleadings.
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Instruction authorizing recovery under either count of declaration.
Chicago & A. R. Co. *v.* Glenny *et al.* (Ill.), 839.

Instructions confined to negligence alleged.
Moss *v.* North Carolina R. Co. (N. Car.), 19.

Instructions contrary to evidence are reversible error.
Penny *v.* New York Cent. & H. R. R. Co. (N. Y.), 180.

Instructions misleading as to character of evidence necessary are erroneous.
Weiss *v.* Bethlehem Iron Co. (C. C. A.), 305.

Instructions presenting leading points of but one side are erroneous.
Weiss *v.* Bethlehem Iron Co. (C. C. A.), 305.

Instruction that company is liable if its servants "failed to do any thing that they were required to do," is error.
Louisville & N. R. Co. *v.* Clark's Adm'r (Ky.), 407.

Instruction that contributory negligence is based upon, and cannot exist without negligence on defendant's part.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 503.

Instruction that plaintiff assumed "natural" risks of employment not misleading where correct instruction as to risks assumed has previously been given.
Galveston, H. & H. R. Co. *v.* Bohan (Tex.), 492.

Instruction that trainmen should exercise "greater care" at crossing is too indefinite.
Louisville & N. R. Co. *v.* Clark's Adm'r (Ky.), 408.

INSTRUCTIONS—*Continued.*

It is not reversible error for the court after reciting the nature of the action, the issues, etc., to refer the jury to the petition for a fuller statement of the grounds of negligence.
Union Pac. Ry. Co. *v.* Sternberger (Kan.), 746.

Measure of damages.
Central of Ga. Ry. Co. *v.* Johnston (Ga.), 286.

Negligence in starting train.
Johnson *v.* Southern Ry. Co. (S. Car.), 273.

Right of recovery for death of minor servant.
Middle Georgia & A. Ry. Co. *v.* Barnett (Ga.), 532.

Rules as to care in running trains which are not applicable to case should not be stated to jury.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 782.

Scope of employment.
Morbey *v.* Chicago & N. W. Ry. Co. (Iowa), 688.

Value of testimony.
Pomeroy *v.* Boston & M. R. R. (Mass.), 119.

Where instruction requested fails to present distinctly a material fact which may control, it is properly refused.
Weiss *v.* Bethlehem Iron Co. (C. C. A.), 305.

Where the fact that engine causing a fire passed along defendant's is undisputed, no error is committed in assuming such to be the case in instructing the jury.
Chicago & A. R. Co. *v.* Glenny *et al.* (Ill.), 839.

INSURANCE.

See Fires Set by Engines.

INTERROGATORIES.

Submitting special interrogatories.
Chicago & A. R. Co. *v.* Winters (Ill.), 93.

INTOXICATION.

Carrier liable for death of intoxicated passenger carried beyond station and then expelled from depot.
Haug *v.* Great Northern Ry. Co. (N. Dak.), 25.

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JURISDICTION.

Administrator may sue in circuit court of county where deceased resided, in action for wrongful death, although the accident occurred in another county.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Federal court decreeing receivership of a railroad has jurisdiction to prevent the establishing in a state court of a claim for negligence after foreclosure sale and pending delivery to purchaser.
Fidelity Insurance, Trust & Safe-Deposit Co. *v.* Norfolk & W. R. Co. (C. C.), 874.

Passenger injured during receivership may sue succeeding corporation in state court of competent jurisdiction, and is not required to resort to court which decreed receivership.
Atchison, T. & S. F. Ry. Co. *v.* Cunningham (Kan.), 132.

JURORS.

Misconduct in visiting scene of accident without permission of court.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.

Stockholders and employees of lessee railroad company not disqualified to act as jurors in action against lessor.
Augusta Southern R. Co. *v.* McDade (Ga.), 548.

Utah statute as to selection.
Williams *v.* Oregon Short-Line R. Co. (Utah), 61.

LATENT DEFECTS.
See Master and Servant.

LEASES.
See Leased Roads.

LEASED ROADS.
Business of, as well as that of main line considered in compelling operation of passenger train.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 227.
Duty of lessee to provide for transportation of passengers and freight.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 227.
Obligations assumed by lessee.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 227.

LICENSEE.
One assisting departing passenger.
Whitley *v.* Southern Ry. Co. (N. Car.), 210.

LIENS.
Contractors furnishing labor are not laborers within meaning of statute giving lien.
Little Rock, H. S. & T. Ry. Co. *et al. v.* Spencer *et al.* (Ark.), 861.

LIMITATION OF ACTIONS.
Petition may be amended after statutory limitation for time of bringing of action has elapsed.
Missouri Pac. Ry. Co. *v.* Moffatt *et al.* (Kan.), 397.

LIMITATION OF LIABILITY.
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MALICE.
Malice implied where carrier carelessly repudiated valid ticket.
Winters *v.* Cowen *et al.* (C. C.), 40.

MALICIOUS PROSECUTION.
Company's ratification of conductor's act in arresting passenger.
Lezinsky *v.* Metropolitan St. Ry. Co. (C. C. A.), 55.
Conductor's employment does not extend to leaving car in order to have passenger arrested for failure to pay fare.
Lezinsky *v.* Metropolitan St. Ry. Co. (C. C. A.), 55.

MANDAMUS.
See Bridges.
Business of leased lines as well as of main line considered in compelling operation of separate passenger train.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 277.
Equipment and operation of railroads.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 227.
Operation of separate passenger train.
People *ex rel.* Cantrell *v.* St. Louis, A. & T. H. R. Co. (Ill.), 227.

MASTER AND SERVANT.
See Fellow Servants.
Assumption of Risk.
Stockwell *v.* Chicago & N. W. Ry. Co. (Iowa), 576.
Dangerous premises.
Middle Georgia & A. Ry. Co. *v.* Barnett (Ga.), 532.
Defective appliances.
Quinn *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 512.
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Defective appliances—question for jury.
Cameron *v.* Great Northern Ry. Co. (N. Dak.), 520.
Foreign cars.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 502.
Improper placing of bridge guard not a risk assumed by servant.
Hardy *v.* Boston & M. R. R. (N. H.), 565.

MASTER AND SERVANT— *Continued.*

Injury from cattle getting on fenced track.
Houston & T. C. R. Co. *v.* Quill *et al.* (Tex.), 736.

Instruction must not ignore defense of.
Quinn *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 512.

Meeting of drawheads.
Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Obstruction on track.
Galveston, H. & H. R. Co. *v.* Bohan (Tex.), 490.

Ordinary perils.
Missouri Pac. Ry. Co. *v.* Lyons (Neb.), 610.

Risks assumed need not be specified in charging jury.
Augusta Southern R. Co. *v.* McDade (Ga.), 548.

Risk of injury from overhead bridge not assumed by servant.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Risk of injury from unblocked rail assumed where servant is chargeable with notice.
Wabash R. Co. *v.* Ray (Ind.), 593.

Risk of obstruction on track not assumed by servant.
Galveston, H. & H. R. Co. *v.* Bohan (Tex.), 492.

Servant coupling cars in yard does not assume risk of injury from ashes on track.
Louisville & N. R. Co. *v.* Vestal (Ky.), 633.

Servant does not assume risk of injury by failing to examine repairs made at his instance.
Quimby *v.* Boston & M. R. R. (N. H.), 517.

Servant does not assume risk of injury from bridge in dangerous proximity to track.
Hughes *v.* Louisville & N. R. Co. (Ky.), 560.

MASTER AND SERVANT— *Continued.*

Servant not chargeable with notice does not assume risk of injury from unballasted switch.
Lake Erie & W. R. Co. *v.* Morrissey (Ill.), 624.

Servant tearing down wall does not assume risk of injury from falling thereof.
Wolf *v.* Great Northern Ry. Co. (Minn.), 619.

Bridges.

Brakeman raising his head while passing under low bridge of which he knew is guilty of contributory negligence.
Haffner's Adm'r *v.* Chesapeake & O. Ry. Co. (Va.), 556.

Failure to construct, so that servants standing on top of train can safely pass under is negligence.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Risk of injury from overhead bridge not assumed by servant.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Servant does not assume risk of injury from dangerous proximity of bridge.
Hughes *v.* Louisville & N. R. Co. (Ky.), 560.

Servant does not assume risk of injury from low bridge caused by improper height of bridge guard.
Hardy *v.* Boston & M. R. R. (N. H.), 565.

Burden of proof to show master's negligence.
Louisville & N. R. Co. *v.* Victory (Ky.), 538.

Care to be exercised by master as to roadbed, machinery and appliances.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.

MASTER AND SERVANT— *Continued.*

Care to be exercised by servant for his own safety.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 722.

Contract of exemption from liability for negligence—South Carolina constitution.
Johnson *v.* Charleston & S. Ry. Co. (S. Car.), 761.

Contributory Negligence.

Boarding moving car in obedience to foreman's order is not contributory negligence *per se* on part of servant.
Chattanooga Elec. Ry. Co. *v.* Lawson *et al.* (Tenn.), 669.

Choosing more dangerous method of coupling cars where there is a safer.
Moore *v.* Kansas City, H. S. & M. Ry. Co. (Mo.), 580.

Servant adopting more hazardous of two methods of performing work, where it is one that reasonable and prudent persons would adopt under like circumstances.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 722.

Servant deprived of capacity to act by imminent danger not guilty of contributory negligence in failing to obey signal.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 782.

Servant not guilty of contributory negligence in assuming dangerous position in obedience to orders when his duty could not be otherwise performed.
Louisville Southern R. Co. *et al. v.* Tucker's Adm'r (Ky.), 805.

Servant obeying order of vice-principal and going into post of obvious danger, relying on promise by vice-principal of protection, not guilty of contributory negligence, as matter of law unless danger was so great that a person of ordinary prudence would have refused to obey.
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 781.

MASTER AND SERVANT— *Continued.*

Coupling Cars.

Assumption of risk of injury from cinders in yard.
Louisville & N. R. Co. *v.* Vestal (Ky.), 633.

Choosing dangerous method where there is a safer is contributory negligence.
Moore *v.* Kansas City, H. S. & M. Ry. Co. (Mo.), 580.

Proximate cause of injury.
Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Risk of drawheads meeting assumed.
Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Defective Appliances.

Assumption of risk.
Quinn *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 512.

Assumption of risk a question for jury.
Cameron *v.* Great Northern Ry. Co. (N. Dak.), 520.

Assumption of risk from latent defects.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 503.

Latent defects.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 502.

Duty of master as to appliances.
Cameron *v.* Great Northern Ry. Co. (N. Dak.), 520.

Mere fact that appliance was defective does not entitle servant injured to recover if it does not appear that

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his injury was caused by the defect.
Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Presumption of servant as to safety of appliance.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 503.

Servant injured by reason of defect in appliance cannot recover if by exercising reasonable care he could have discovered such defect before using the appliance.
Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Tests necessary to discover defect.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 503.

Discharge Lists.

Master may communicate causes of discharge to other companies.
Hundley *v.* Louisville & N. R. Co. (Ky.), 749.

Master may keep record of causes for which it discharged servant.
Hundley *v.* Louisville & N. R. Co. (Ky.), 749.

Duty to ballast switch tracks.
Lake Erie & W. R. Co. *v.* Morrissey (Ill.), 624.

Duty to have safe roadbed cannot be delegated.
Wright *v.* Southern Ry. Co. (N. Car.), 717.

Evidence of defective condition of track and notice to master thereof.
Louisville & N. R. Co. *v.* Victory (Ky.), 538.

Foreign Cars.

Assumption of risk.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 502.

Inspection.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 502.

Incompetency of fellow servant.
Morrow *v.* St. Paul City Ry. Co. (Minn.), 836.

MASTER AND SERVANT— *Continued.*

Injuries caused by unauthorized use of hand-car by servant does not render master liable.
Branch *v.* International & G. N. R. Co. (Tex.), 378.

Master liable for death of servant caused by burning of trestle ignited through its negligence in allowing inflammable debris to accumulate around it.
Bateman *v.* Peninsular Ry. Co. (Wash.), 678.

Master not guilty of negligence in allowing small splinter of steel to remain on rail.
Barrett *v.* Great Northern Ry. Co. (Minn.), 442.

Master not required to remove all snow from switch-yards.
Fay *v.* Chicago, St. P., M. & O. Ry. Co. (Minn.), 641.

Oiling engine by hand not contributory negligence on part of employee.
Stockwell *v.* Chicago & N. W. Ry. Co. (Iowa), 576.

Proximate Cause.

Hannigan *v.* Lehigh & H. R. Ry. Co. (N. Y.), 605.

Failure of company to discover defect in valve whereby plaintiff was obliged to expose himself to injurious heat in remedying the consequences of such defect was not the proximate cause of injuries resulting from the exposure.
Stockwell *v.* Chicago & N. W. Ry. Co. (Iowa), 576.

Servant has cause of action for injuries received by being struck by body of trespasser negligently killed by company.
Western & A. R. Co. *v.* Bailey (Ga.), 739.

Release.

Execution of release of claim for damages and acceptance of benefits does not estop

MASTER AND SERVANT— *Continued.*
injured employee from maintaining action.
Johnson *v.* Charleston & S. Ry. Co. (S. Car.), 761.
Release executed by servant is not void, although he is required to contribute to relief fund on entering service, where he is allowed, after being injured, to exercise his choice between suing for his injuries and accepting benefits.
Johnson *v.* Charleston & S. Ry. Co. (S. Car.), 762.
Release signed in consideration of receipt of benefits from sick fund is binding.
Johnson *v.* Charleston & S. Ry. Co. (S. Car.), 762.
Rules.
Failure of master to make and enforce proper rules not a sufficient averment of an element of negligence upon which to base an action for injuries to an employee.
Delaware, L. & W. R. Co. *v.* Voss (N. J.), 820.
Liability of master for failure to make and enforce.
Delaware, L. & W. R. Co. *v.* Voss (N. J.), 820.
Servant without knowledge or notice of rules not bound thereby.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.
Servant chargeable with notice of slipperiness of snow in yard and danger therefrom.
Fay *v.* Chicago, St. P., M. & O. Ry. Co. (Minn.), 641.
Sufficiency of evidence to show master's negligence.
Lake Shore & M. S. Ry. Co. *v.* Andrews (Ohio), 545.
Sufficiency of evidence to show that master was chargeable with notice of defect in track.
Louisville & N. R. Co. *v.* Victory (Ky.), 538.
Wages of discharged employees,

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constitutionality of Arkansas statute.
St. Louis, I. M. & S. Ry. Co. *v.* Paul (U. S.), 755.

MEASURE OF DAMAGES.
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MILEAGE TICKETS.
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MIXED TRAINS.
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MODEL.
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MORTGAGES.
Car rental contracted prior to receivership not a preferential claim.
Grand Trunk Ry. Co. *v.* Central Vermont R. Co. (C. C.), 865.
Liability for negligence after foreclosure sale and pending delivery to purchaser.
Fidelity Insurance, Trust & Safe-Deposit Co. *v.* Norfolk & W. R. Co. (C. C.), 873.
Property covered by mortgage of after acquired property.
Central Trust Co. of N. Y. *v.* Chattanooga, R. & C. R. R. *et al.* (Owens *et al.* Interveners), 869.
Right to earnings during receivership.
Central Trust Co. of N. Y. *v.* Chattanooga, R. & C. R. R. *et al.* (Owens *et al.*, Interveners) (C. C.), 869.

MUNICIPAL AID BONDS.
City not estopped to deny its authority subscribe to bonds of foreign corporation where such bonds state on their face

MUNICIPAL AID BONDS—*Continued.*

that they are issued under an act limiting such authority to subscribe to domestic corporations.
City of Johnson City *v.* Charleston, C. & C. R. Co. *et al.* (Tenn.), 867.

Municipal subscriptions to bonds of foreign corporations not authorized under laws of Tennessee.
City of Johnson City *v.* Charleston, C. & C. R. Co. *et al.* (Tenn.), 867.

Validity of issue—constitutional law.
City of Johnson City *v.* Charleston, C. & C. R. Co. *et al.* (Tenn.), 866.

MUNICIPAL CORPORATIONS.
See Municipal Aid Bonds.

NEGLIGENCE.
See Crossings.
Evidence.
Pleading.

Allowing the accumulation of inflammable debris near trestle in section subject to forest fires is negligence.
Bateman *v.* Peninsular Ry. Co. (Wash.), 678.

Burden of Proof.
Augusta Southern R. Co. *v.* McDade (Ga.), 548.
Cox *v.* Norfolk & C. R. Co. (N. Car.), 391.
Louisville & N. R. Co. *v.* Victory (Ky.), 536.
Rogers *v.* Louisville & N. R. Co. (C. C.), 813.

Burden is on plaintiff, in action for injuries alleged to have been caused by fellow servant to show that he was free from fault, and when this is done, the burden is on defendant to show that his servants were not at fault.

NEGLIGENCE—*Continued.*

Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 721.

Burden on master claiming that servant was injured by negligence of fellow servant to show that such was the case.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.

Carrier cannot stipulate for exemption from liability for servant's negligence.
Williams *v.* Oregon Short-Line R. Co. (Utah), 61.

Child injured while sleeping on track at crossing cannot recover although company was negligent, unless such negligence was wilful or wanton.
Krenzer *v.* Pittsburgh, C., C. & St. L. Ry. Co. (Ind.), 343.

Conductor directing person assisting passenger to alight from moving train.
Johnson *v.* Southern Ry. Co. (S. Car.), 272.

Failure of master to make and enforce proper rules not a sufficient averment of an element of negligence upon which to base an action for injuries to an employee.
Delaware, L. & W. R. Co. *v.* Voss (N. J.), 820.

Failure of superintendent who has been notified that forest fire is raging on road to so notify trainmen is negligence.
Bateman *v.* Peninsular Ry. Co. (Wash.), 679.

Failure to construct bridge so that employee can pass under while standing erect.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Failure to provide butt post on stub track.
Chicago, & E. I. R. Co. *v.* Driscoll (Ill.), 644.

Failure to provide crossing of sufficient width for passage of harvesting machine.
Atchison, T. & S. F. R. Co. *v.* Henry (Kan.), 482.

In an action under the Illinois

NEGLIGENCE—*Continued.*
statute, to recover for damage caused by fire set by engine, particular facts constituting negligence need not be proven.
Chicago & A. R. Co. *v.* Glenny *et al.* (Ill.), 839.
In order to recover for injuries caused by negligence of fellow servant, plaintiff must have been free from negligence.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 721.
Instruction as to negligence in starting train.
Johnson *v.* Southern Ry. Co. (S. Car.), 273.
Instructions limited to negligence alleged.
Moss *v.* North Carolina R. Co. (N. Car.), 19.
Inviting passenger to alight at dangerous place.
Mensing *v.* Michigan Cent. R. Co. (Mich.), 223.
Inviting passenger to alight at dangerous place.
Chicago & A. R. Co. *v.* Winters (Ill.), 193.
Sowash *v.* Consolidated Traction Co. (Pa.), 124.
"Kicking back" cars not negligence *per se*.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 722.
Leaving car door open and causing sudden jerk of train, injuring passenger closing door, is actionable negligence.
Denver & R. G. R. Co. *v.* Bedell (Colo.), 141.
Liability for negligence after foreclosure sale and pending delivery to purchaser.
Fidelity Insurance, Trust & Safe-Deposit Co. *v.* Norfolk & W. R. Co. (C. C.), 873.
Master not negligent in allowing small projecting splinter to remain on rail.
Barrett *v.* Great Northern Ry. Co. (Minn.), 742.
Negligence an essential element under Ohio statute, in action for loss from fires set by engines.
Continental Trust Co. *v.* Toledo, St. L. & R. C. R. Co. (C. C.), 854.
Negligence of company question for jury, where passenger riding on platform of street car is injured by sudden jerk.
Bradley *v.* Second Ave. R. Co. (N. Y.), 184.
Negligence of servant in operating hand-car used without authority does not render master liable.
Branch *v.* International & G. N. R. Co. (Tex.), 378.
Negligence of vice-principal.
Chattanooga Elec. Ry. Co. *v.* Lawson *et al.* (Tenn.), 669.
"Negligent" speed.
Central of Ga. Ry. Co. *v.* Johnston (Ga.), 286.
One assisting passenger to board train was compelled by sudden jerk of car to jump, and was injured. *Held*, negligence of carrier was question for jury.
Whitley *v.* Southern Ry. Co. (N. Car.), 210.
Passenger on platform of car at station injured by jerking of train swinging door to, company's negligence is for jury.
McCurrie *v.* Southern Pac. Co. (Cal.), 170.
Presumption of, in action for death of servant.
Augusta Southern R. Co. *v.* McDade (Ga.), 548.
Presumption of, under Florida statute, where injury resulted from act being performed by fellow servants of plaintiff, but in which he was not participating.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 721.
Presumption under Georgia statute.
Augusta Southern R. Co. *v.* McDade (Ga.), 549.
Question of fact.
Cameron *v.* Great Northern Ry. Co. (N. Dak.), 520.

NEGLIGENCE—*Continued.*
Graham *v.* McNeill (Wash.), 149.
Munch *v.* Great Northern Ry. Co. (Minn.), 586.
Question of fact, where evidence is conflicting.
Cox *v.* Norfolk & C. R. Co. (N. Car.), 391.
Rate of speed and signals at country crossings—negligence as to, questions for jury.
Georgia R. & B. Co. *v.* Cromer (Ga.), 318.
Rebutting presumption in action for injuries to stock.
Southern Ry. Co. *v.* Early (Ga.), 859.
Speed in excess of ordinance is negligence, *prima facie*.
Chicago & A. R. Co. *v.* Winters (Ill.), 93.
Sudden jerk of street car injuring passenger riding on running board.
Hassen *v.* Nassau Elec. R. Co. (N. Y.), 1.
Sufficiency of evidence.
Ayers *v.* Rochester R. Co. (N. Y.), 165.
Lake Shore & M. S. Ry. Co. *v.* Andrews (Ohio), 545.
Wanton and wilful negligence.
Krenzer *v.* Pittsburgh, C.,C. & St. L. Ry. Co. (Ind.), 344.
What evidence admissible in action for.
Florida Cent. & P. R. Co. *v.* Mooney (Fla.), 721.
Where master's negligence is proximate cause, he is not relieved by the fact that the negligence of a fellow servant concurred
Louisiana Western Extension Ry. Co. *et al. v.* Carstens *et al.* (Tex. Civ. App.), 782.

NEW TRIAL.
Amendment of testimony.
Bradley *v.* Second Ave. R. Co. (N. Y.), 184.
Error to refuse, where verdict is contrary to evidence.
Western & A. R. Co. *v.* Goodwin (Ga.), 219.
Refusal by circuit court of new

NEW TRIAL—*Continued.*
trial not reviewable either on ground of insufficiency of evidence or of excessive damages.
Gillman *v.* Florida Cent. & P. R. Co. (S. Car.), 126.
Where only appeal is based on inadequacy of damages trial of cause will be confined to that issue.
Strother *et ux. v.* Aberdeen & A. R. Co. (N. Car.), 122.

NOTICE.
Notice to common officer of railroad.
Harding *v.* Lynn & B. R. Co. (Mass.), 865.

OBSTRUCTED VIEW.
See Crossings.

ORDINANCES.
See Speed.
Crossings.

PARTIES.
Judgment will not be reversed as to proper defendant by reason of improper joinder of another.
Louisville Southern Ry. Co. *et al. v.* Tucker's Adm'r (Ky.), 806.
Mandamus to compel construction of bridge over street.
Williams, State's Att'y, *v.* New York, N. H. & H. R. Co. (Conn.), 860.

PLEADING.
See Variance.
Middle Georgia & A. Ry. Co. *v.* Barnett (Ga.), 532.
Allegations in action for personal injuries.
Williams *v.* Oregon Short-Line R. Co. (Utah), 61.
Complaint in action for injuries to passenger alighting temporarily at intermediate station not demurrable because it did not state plaintiff's object in alighting.
Missouri, K. & T. Ry. Co. *v.* Overfield (Tex. Civ. App.), 207.

PLEADING—*Continued.*

Complaint in action for injury to passenger which charges, that negligence of defendant's servants occasioned such injuries and sets forth the acts causing them is not demurrable for failure to state which act or acts were negligent.
Missouri, K. & T. Ry. Co. *v.* Overfield (Tex. Civ. App.), 207.

Failure of master to make and enforce proper rules not a sufficient averment of an element of negligence upon which to base an action for injuries to an employee.
Delaware, L. & W. R. Co. *v.* Voss (N. J.), 820.

In an action by a baggage-master to recover for injuries alleged to have been caused by the negligence of the engineer in running the train it is not necessary that the petition should allege that they are not fellow servants.
Chicago & A. Ry. Co. *v.* Swan (Ill.), 674.

Knowledge of rules must be pleaded.
Union Stock-Yards Co. *v.* Goodwin (Neb.), 502.

Pecuniary loss need not be specifically alleged in action by widow for death.
Haug *v.* Great Northern Ry. Co. (Minn.), 26.

Petition under Lord Campbell's act not bad on demurrer for failure to allege whether deceased left a widow, if the names of the surviving minor children are averred.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.

Plaintiff confined to negligence alleged in petition.
Louisville & N. R. Co. *v.* Clark's Adm'r (Ky.), 407.

Plaintiff need not allege due care in action for personal injuries where petition does not show contributory negligence.
Galveston, H. & H. R. Co. *v.* Bohan (Tex.), 490.

Sufficiency of general allegation in answer of contributory negligence on part of plaintiff.
Chicago, B. & Q. R. Co. *v.* Oyster (Neb.), 656.

Where passenger sues company selling ticket for injuries received while being carried by another company, the contract between the two companies is a matter of defense.
Barkman *v.* Pennsylvania R. Co. *et al.* (C. C.), 250.

PREFERENTIAL CLAIMS.

See Mortgages.

PREFERRED STOCK.

See Stock.

PRESUMPTIONS.

See Contributory Negligence.

PROXIMATE CAUSE.

See Master and Servant. Negligence.

Negligence of master is proximate cause of injuries of servant injured by being struck by body of a trespasser negligently killed by master.
Western & A. R. Co. *v.* Bailey (Ga.), 739.

QUESTIONS OF FACT.

Assumption by servant of risk from defective appliances.
Cameron *v.* Great Northern Ry. Co. (N. Dak.), 520.
Louisville & N. R. Co. *v.* Cooley's Adm'r (Ky.), 553.

Contributory negligence.
Beecher *v.* Long Island R. Co. (N. Y.), 295.
Bradley *v.* Second Ave. R. Co. (N. Y.), 184.
Cawley *v.* La Crosse City Ry. Co. (Wis.), 454.
Chicago & A. R. Co. *v.* Blaul (Ill.), 418.
McCurrie *v.* Southern Pac. Co. (Cal.), 170.

QUESTIONS OF FACT—*Continued.*
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